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**COMMON LAW AND BANKRUPTCY.**

LONDON  
PRINTED BY SPOTTISWOODE AND CO.  
NEW-STREET SQUARE

A  
MANUAL  
OF  
COMMON LAW AND BANKRUPTCY:

FOUNDED ON  
VARIOUS TEXT-BOOKS AND RECENT STATUTES,  
AND DESIGNED AS  
A COMPANION TO SMITH'S MANUAL OF EQUITY.

---

BY JOSIAH W. SMITH, B.C.L.

ONE OF HER MAJESTY'S COUNSEL;

EDITOR OF MITFORD'S 'CHANCERY PLEADINGS,' AND FRANKS'S 'CONTINGENT REMAINDERS';  
AUTHOR OF 'A COMPENDIUM OF THE LAW OF REAL AND PERSONAL PROPERTY,'  
AND 'A MANUAL OF EQUITY,' AND ONE OF THE CONSOLIDATORS OF  
THE CHANCERY ORDERS.



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LONDON:  
V. & R. STEVENS, SONS, & HAYNES,  
26 BELL YARD, LINCOLN'S INN.  
1862.





## PREFACE.

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THIS small volume is founded on about sixty text-books, which are referred to in it as often as any use has been made of them, and in other instances where a reference to them seemed desirable. And it is the result of an attempt (commenced by the Author about two years ago) to supply what appeared to him to be a great desideratum; namely, a very compendious First Book for students in Common Law and Bankruptcy, forming a companion to his Manual of Equity, which has been so favourably received. But the writer believes it might be also useful to some practitioners in Equity and Conveyancing, upon some points contained in the following pages, to which their attention may not have been directed in the course of practice. And as the Author has reason to

believe that his Manual of Equity has been found of use even by Chancery Barristers, so, perhaps, some members of the Common Law Bar may find this Manual of Common Law useful for perusal, or for reference on circuit, where they may have no opportunity of consulting larger and superior works.

It may be also observed, that the General Reader would find it neither a difficult nor a disagreeable task, to collect from these pages a body of information which would be most useful to him in daily life, as calculated to preserve him from much expense, trouble, and annoyance, too frequently resulting from ignorance of this subject.

The student may not be able to resort to the treatises on the more specific heads of Law which are cited in these pages; but it will of course be necessary for him to pass on from the perusal of this book to the study of some other general Text-books. And from their comprehensiveness, and the very able, agreeable, and instructive style in which they are written, the Author would recommend him to select Broom's Commentaries

on the Common Law, Addison's Contracts, Addison's Torts, the works of the late Mr. John William Smith on Leading Cases and on Contracts, Stephen's Commentaries on the Laws of England, and Best on Evidence.\* These works form a comprehensive and yet very compendious collection of general Text-books; and the student will find it highly desirable not merely to consult them occasionally, but to possess and peruse them. But perhaps the most expedient course for him to adopt, would be, first to read through this Manual once or twice by itself; and then to expand his knowledge, by consulting the passages in those works, as referred to in this book, when he peruses it for the second or third time. By adopting

\* Mr. Broom's Commentaries extend to Practice, which is generally excluded from this Manual, except so far as regards the nature of the different actions and proceedings other than by action. And they include Criminal Law, which forms no part of the subject of these pages. The student will find these Commentaries, the work of Mr. John William Smith on Contracts, and the works of Mr. Addison, very interesting, as well as very profitable. And there is another book by Mr. Broom — his work on Legal Maxims — which would be most useful to the student, though not cited in these pages.



such a course, he will be enabled to enlarge, explain, and illustrate, by memory or manuscript additions, what he has read in the following pages, as well as to find the authorities for it.

Although, of course, this little book is not at all a substitute for those larger works—comprising, as each of them does, a mass of points, cases, and comments, necessarily excluded from this—yet it may prove a useful introduction to them; and may also serve as an epitome and nucleus of a great number of the points that are most fundamental, or most constantly recurring in daily life, and therefore most particularly important to be accurately known and well fixed in the mind.

As it is entirely different, in its nature and the purposes for which it is adapted, from the works on which it is founded, and from all other works on Common Law, and therefore cannot be regarded as competing with any of them; so, on the other hand, the writer believes that, for the same reasons, none of them would serve as a substitute for

it; and that consequently *it may be considered as simply an attempt to supply a vacant place.*

The chapter on Bankruptcy is an original consolidated abridgement and arrangement of the leading provisions of the two great Bankruptcy Acts. In the present unsettled state of the subject, the Author did not think it expedient to trouble the Reader with more than this.

As to the rest (comprising the main body) of the work, on Common Law, great has been the expenditure of time and thought, in selecting, arranging, digesting, compressing, defining, distinguishing, and qualifying, which the preparation of it has involved. It bears the same relation to the text-books cited in it, as those books bear to the Reports and treatises on which they are founded. And in general, if the reader wishes to have the unabridged and unaltered language of the writers cited upon any point, he must turn to their pages, as referred to, for their precise language, as well as for the cases, reasons, illustrations, and other matter connected

with such point. To have added these, would neither have been right towards those Authors, nor compatible with the limited bulk, price, and design of this volume.

To his very learned friend, Mr. O. D. Tudor (who has done so much service to the Profession by valuable works on various branches of the Law), and to his College friend, Mr. George Miller, of Lincoln's Inn and of the Home Circuit, the Author is indebted for kindly perusing the proof sheets, and offering some useful suggestions.

For the imperfections of this Manual, the generous Reader will make allowance, when he considers how extensive is the field of legal lore which it has been necessary to traverse.

LINCOLN'S INN :  
Long Vacation, 1862.

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## OF

### ABBREVIATIONS OF REFERENCES

TO THE TEXT-BOOKS ON WHICH THIS WORK IS FOUNDED, AND  
THE EDITIONS USED.

Abbreviations	Fuller Titles	Editions
Abbott . . .	Abbott on Shipping . . .	9th
Add. Cont. . . .	Addison on Contracts . . .	5th
Add. Torts . . .	Addison on Torts . . .	1st
Archb. Prac. . . .	Archbold's Practice of the Q. B. . .	9th
Arnould . . . .	Arnould on Insurance . . .	2nd
Best . . . .	Best's Law of Evidence . . .	3rd
Bl. Com. . . .	Blackstone's Commentaries . . .	
Bright . . . .	Bright's Husband and Wife . . .	1st
Broom Com. . . .	Broom's Commentaries . . .	2nd
Bunyon . . . .	Bunyon on Life Insurance . . .	1st
Burge . . . .	Burge on Suretyship . . .	1st
Burn . . . .	Burn's Justice . . .	29th
Burton . . . .	Burton's Compendium . . .	
Byles . . . .	Byles on Bills . . .	8th
Chit. B. . . .	Chitty on Bills . . .	10th
Chit. & Tem. on Car. . .	Chitty and Temple on Carriers . .	1st
Co. Litt. . . .	Coke upon Littleton . . .	
Cole Eject. . . .	Cole on Ejectment . . .	1st
Coote's Landl. and Ten. .	Coote's Landlord and Tenant . .	1st
Cross . . . .	Cross on Lien . . .	1st
Cru. . . .	Cruise's Digest . . .	3rd
Dixon . . . .	Dixon's Law of the Farm . . .	2nd
Gale . . . .	Gale on Easements . . .	3rd
Gibbon . . . .	Gibbon on Dilap. and Nuis. . .	2nd
Gilbert . . . .	Gilbert on Distress . . .	3rd
Grant . . . .	Grant on Bankers . . .	1st
Haz. & Roche . . .	Hazlitt and Roche's Bankruptcy Act of 1861 . . .	1st
Jones Bail. . . .	Jones on Bailments . . .	4th
Lindley . . . .	Lindley on Partnership . . .	1st
Maclachlan . . .	Maclachlan on Shipping . . .	1st



# TABLE OF ABBREVIATIONS.

Abbreviations	Fuller Titles	Editions
Macph. . . .	Macpherson on Infants . . .	1st
Macq. . . .	Macqueen on Divorce . . .	2nd
Man. & Pol. . . .	Maude and Pollock on Shipping . . .	2nd
Mayne . . . .	Mayne on Damages . . .	1st
Morton's V. & P. . . .	Morton's Vendors and Purchasers of Personal Chattels . . .	1st
Nicol . . . .	Nicol's Bankruptcy Acts . . .	1st
Oliph. . . .	Oliphant on Horses . . .	2nd
Paley . . . .	Paley on Principal and Agent . . .	3rd
Phillips . . . .	Phillips on Lunacy . . .	1st
Powell, or Pow. Evid. . . .	Powell on Evidence . . .	2nd
Pulling . . . .	Pulling on Attorneys and Soli- citors . . .	3rd
Roscoe on Evid. . . .	Roscoe on Evidence . . .	10th
Selw. N. P. . . .	Selwyn's Nisi Prius . . .	12th
Sm. Action . . . .	Smith's (John W.) Action at Law . . .	7th
Sm. Cont. . . .	— Contracts . . .	3rd
Sm. Landl. and Ten. . . .	— Landlord and Tenant . . .	1st
Sm. L. C. . . .	— Leading Cases . . .	5th
Sm. Merc. Law . . . .	— Compendium of Mercantile Law . . .	6th
Sm. Manual . . . .	Smith's (Josiah W.) Manual of Equity . . .	6th
Sm. Law of Prop. . . .	— Compendium of the Law of Real and Personal Property . . .	2nd
Sm. Mast. and Serv. . . .	Smith's (Chas. Manley) Master and Servant . . .	2nd
Steer's Par. Law. . . .	Steer's Parish Law . . .	3rd
Ste. Com. . . .	Stephen's Commentaries . . .	4th
Ste. Lect. . . .	Stephen's Lectures on Mercantile Law . . .	1st
Story on Agency . . . .	Story's Law of Agency . . .	2nd
Sup. to Sel. N. P. . . .	Supplement to Selwyn's Nisi Prius . . .	
Tapp. . . .	Tapp on Maintenance . . .	1st
Tapping . . . .	Tapping on Mandamus . . .	1st
Tomlin . . . .	Tomlin's Law Dictionary . . .	
Trower . . . .	Trower on Debtor and Creditor . . .	1st
Tudor's Ca. on M. L. . . .	Tudor's Leading Cases on Mer- cantile Law . . .	1st
Tudor's Real Prop. Ca. . . .	Tudor's Leading Cases on Real Property and Conveyancing . . .	1st
Wharton . . . .	Wharton's Law Lexicon . . .	2nd
Wms. Ex. . . .	Williams's Executors . . .	5th
Wms. on Plead. . . .	Williams on Pleading . . .	1st
Woodfall . . . .	Woodfall's Landlord and Tenant . . .	7th
Woolr. Ways. . . .	Woolrych on Ways . . .	2nd

**PART I.**

**OF PRIVATE RIGHTS AND WRONGS CONCERNING THE  
PERSON, CHARACTER, OR REPUTATION.**

**B**

5-11

## CHAPTER I.

## OF CORPORAL SECURITY.

**PART I.** LIFE is the immediate gift of God, a right  
**CAP. I.** inherent by nature in every individual. (1

**Right to life  
and corporal  
security.**

Bl. Com. 129, 134.) And, as a general rule, everyone is also entitled to immunity from all corporal insults and injuries.

**Injuries to  
corporal  
security.**

Injuries to corporal security are either direct or consequential. (Broom Com. 662; 3 Ste. Com. 461.)

**Evil intent.**

In order to maintain an action for a bodily injury, whether direct or consequential, it is not essential to show that it originated in any evil intent, or was wilful. A person may be sued for an act done accidentally or by mistake, unless it was unavoidable or occasioned by the plaintiff's negligence. Frequently, however, such injuries may be made the subject of a criminal prosecution; and in that point of view the existence of a criminal intent may be most material. (Broom Com. 662-3; Roscoe on Evid. 592.)

## SECTION I.

*Of Direct Injuries to Corporal Security.*

Corporal security may be directly affected by threats, assault, battery, wounding, or mayhem. PART I.  
CAP. I.  
SEC. I.

1. Threats of bodily hurt, through fear of which a person's business is interrupted, are a ground of action. But they do not constitute a ground of action where they produce no inconvenience. (3 Ste. Com. 459.) 1. Threats.

2. An apparent attempt or offer, coupled with a present ability, to do hurt to the person of another, constitutes an assault; so that even the holding up a fist or shaking a whip, when near enough to be able to hit, or advancing with a whip or a fist uplifted in a threatening manner, is an assault. (Selw. N. P. 26; Add. Torts, 395; Broom Com. 664.) 2. Assault.

3. A battery, as distinguished from an assault, is the actual and unwarrantable striking a person, or touching him, in a violent, angry, rough, rude, or insolent manner. (Add. Torts, 396; Broom Com. 664, 666; 3 Ste. Com. 459; Selw. N. P. 4.) 3. Battery.

4. Wounding is an aggravated species of battery, amounting to a bodily hurt. 4. Wounding.

5. Mayhem is the depriving a person of,

PART I. or injuring, a member of the body which is  
CAP. I. available for fighting (such as a leg, an arm,  
SEC. I. an eye, or a fore tooth), or otherwise injuring  
him corporally in such a manner as to  
diminish his power of fighting or defending  
himself. And for this, or for wounding,  
heavy damages are recoverable, unless the  
act amounts to a felony, or can be justified  
or excused. (Add. Torts, 396; 3 Ste. Com.  
460; Wharton's Law Lexicon.)

Assault and  
battery in  
defence.

If the plaintiff was the aggressor, and struck or even only assaulted the defendant in the first instance, and the act of the defendant was in actual self-defence, it is justifiable. And an assault and battery is justifiable when in actual defence of a wife or husband, parent or child, master or servant. But if a blow is struck after all danger is past, it is not justifiable. (Add. Torts, 396-7; Broom Com. 665; 3 Ste. Com. 461; Roscoe on Evid. 594; Selw. N. P. 32.)

Forcible  
ejection or  
entry.

A churchwarden or beadle may, if necessary, lay hands upon a person, to turn him out of church, for improper behaviour during divine service. (Broom Com. 665-6; 3 Ste. Com. 461.)

An assault and battery may also be justified on the ground of its being in defence of the

possession of a house or close, or of chattels. If a person forcibly enters into a house, he may be forcibly ejected; but if he enters quietly, he must be requested to retire before he can be lawfully turned out, and then, if he refuses to retire, the owner may use as much force as is necessary to compel him. But in neither case may an unnecessary degree of force be resorted to. (Add. Torts, 397-8; Selw. N. P. 32-3; Broom Com. 665; 3 Ste. Com. 461; Roscoe on Evid. 597.)

PART I.  
CAP. I.  
SEC. I.  
—

A forcible entry is not lawful, even where the law gives a right of entry. (Add. Torts, 398; Cole on Eject. 69, 70, 686-690; Woodfall, 858, 860.)

In the case of an affray, any person is justified in interfering and using such a degree of force as may be necessary for the purpose of separating the combatants and putting an end to it. (Add. Torts, 398-9; 1 Burn's Justice, 56.)

Putting  
down an  
affray.

When a person has been assaulted in such a way as to put him in fear of grievous bodily harm, mayhem inflicted in self-defence is excusable. But a person may not make a return, in self-defence, wholly disproportionate to the injury he has received. (Add. Torts, 399; Roscoe on Evid. 594-5.)

Where may-  
hem is ex-  
cusable.

Dispropor-  
tionate  
injury in  
return.

## SECTION II.

*Of Consequential Injuries to Corporal Security.*

PART I. Consequential, as distinguished from direct  
CAP. I. injuries, frequently arise from nuisances or  
SEC. II. from negligence.

Definition of  
a nuisance.

A nuisance is something done which has the effect of unwarrantably marring the enjoyment of the rights of another person.

Where redress not granted.

Redress cannot be obtained for a thing as a nuisance, where it merely involves a reasonable use of the rights of the person charged with creating it, and it merely abridges the pleasure of the person suffering from it: it must, at the least, unwarrantably render the enjoyment of life or property uncomfortable. And hence the carrying on an offensive trade may be actionable if carried on in one locality, but not so if carried on in another. (See Add. Torts, 74; Roscoe on Evid. 514-5; Selw. N. P. 1129-31; Bamford v. Turnley, 10 W. R. 803. And see p. 57, *infra*.)

Different  
sorts of  
nuisances.

Some nuisances affect the enjoyment of rights concerning the person; others affect the enjoyment of proprietary rights. Some of the former are noticed in this section; some of the latter in a subsequent page.

Nuisances are either public or private. PART I.  
CAP. I.  
SEC. II.  
Public or common nuisances are those things which prejudicially affect the public, i. e. all persons who come within the sphere of their operation, though they may affect some persons more than others. Private nuisances are things prejudicial to the enjoyment of private rights. (Broom Com. 693 ; 3 Ste. 490.)

If a person lawfully traversing land falls into an unguarded well or mining shaft, Wells of shafts. without negligence or misconduct on his part, the occupier of the land is responsible in damages. But if the person injured were trespassing, and the well or shaft were more than twenty-five yards from a public carriage-way, the occupier would not be liable. (Add. Torts, 80, 95.)

If a landowner suffers a path to his house Dangerous paths. to be used, he is responsible for any act of his whereby injury arises to other persons, without giving them timely notice, or revoking the licence to use it. (Add. Torts, 81.)

If a householder leaves a cellar, vault, Dangerous vaults, areas, or sewers. area, or sewer unguarded, so close to a highway as to be dangerous to passengers in the dark or in foggy weather, he is responsible for any injury occasioned thereby. (Add. Torts, 82, 96 ; Roscoe on Evid. 528-9.)



PART I.  
CAP. I.  
SEC. II.

Ferocious  
animals.

Whoever keeps an animal which he knows to be wont to attack mankind, is liable to an action for damages by any person injured by it. But a person may allow a fierce dog to be loose at night for the protection of the premises; yet not in the open approaches to a house, so as to injure persons lawfully coming to it. (Add. Torts, 96; Roscoe on Evid. 525-6; Dixon's Law of Farm, 110-21.)

Injuries from  
negligence or  
carelessness.

An action may be maintained for injuries to corporal security arising from negligence or want of proper care, in other cases besides those of nuisances.

Injury from  
furious or  
careless driv-  
ing.

Thus, when a coach is overturned and a passenger is thrown out, owing to the carelessness of the driver, the passenger may bring an action against the coach proprietor. (3 Ste. Com. 461; Roscoe on Evid. 518.) And a person walking or riding on a road, who sustains an injury in consequence of the furious, careless, or negligent driving of another, may maintain an action, unless his own want of reasonable care conduced to the injury. (See Oliphant on Horses, 225.)

Duty of per-  
sons driving  
and walking.

A person driving is not bound to keep on the regular side of the road; but when on the other side, he must use greater care to avoid a collision. A person driving over a

crossing for foot-passengers, or in a crowded part, ought to drive slowly and carefully; but it is also the duty of a foot-passenger to use due care, so as not to get recklessly among the carriages. (Add. Torts, 240; Oliphant on Horses, 241-3; Roscoe on Evid. 520-1.)

PART I.  
CAP. I.  
SEC. II.  
—

And it may here be added that redress may be had by action for injuries to the health of an individual, by the sale of bad wine or provisions, or by the neglect or unskilful treatment of his medical attendant. (Broom Com. 692, 695-6; 3 Ste. Com. 462.)

Injuries to  
the health.

When the death of a person is caused by a tort which would have entitled him or her to damages, an action for damages may be brought by his or her personal representative, for the benefit of his or her wife, husband, parent, grandparent, step-parent, child, grand-child and step-child, in such shares as the jury shall direct; and the measure of damages is the actual or contingent pecuniary loss to the family from the death; but the jury cannot take into consideration the funeral expenses or mourning, or the mental suffering occasioned to the family. (Broom Com. 689-91; Wms. on Executors, 710-11; Add. Torts, 254, 267; 9 & 10 Vic. c. 93.)

Action by  
personal re-  
presentative  
of a person  
killed by a  
tort.

## CHAPTER II.

## OF CORPORAL LIBERTY.

**PART I.** EVERY adult has an inherent right of per-  
**CAP. II.** sonal liberty, which consists in the power of  
 locomotion without restraint other than by  
 the due course of law. (1 Ste. Com. 145.)

Corporal  
 liberty de-  
 fined.

How vio-  
 lated.

This right may be violated by wrongful,  
 usually termed false imprisonment, or by  
 wrongful, usually termed malicious arrest.

Definition of  
 wrongful or  
 false impris-  
 onment.

Wrongful or false imprisonment is a tres-  
 pass committed by arresting and detaining  
 a person without legal grounds, or without  
 legal warrant duly executed, whether such  
 detention be in a prison, or in a private  
 house, or in the street, or elsewhere. (Add.  
 Torts, 400; Broom Com. 696; 3 Ste. Com.  
 471-2; Selw. N. P. 919.)

In what it  
 consists.

To constitute imprisonment, it is not  
 necessary that the person said to be im-  
 prisoned should be under any physical re-  
 straint or confinement. Any restraint on  
 the free power of locomotion, though it be  
 only by a show of authority or force, con-  
 stitutes imprisonment. (Add. Torts, 400.)

Authority of  
 justice of  
 peace to

If a justice of the peace sees a felony or  
 other breach of the peace committed in his

presence, he may personally apprehend the felon or command any other person to apprehend him ; but if the offence is committed in his absence, he must issue his warrant in writing to apprehend the offender. (Broom Com. 705 ; 1 Burn's Justice, 272.)

PART I.  
CAP. II.

A constable may not arrest a person, without warrant, merely on suspicion of his having committed a misdemeanour. But if a constable has reasonable cause to suspect that a person has committed a felony, or if one man makes a reasonable charge of felony against another, and requires an officer to arrest him, the officer may detain him until he can be brought before a magistrate. And the constable will be secure, though it turn out that no felony was committed. (Add. Torts, 401-2 ; Broom Com. 700, 702 ; 1 Burn's Justice, 273 ; Selw. N. P. 936.)

Where a constable may arrest without warrant.

A constable may ex-officio arrest a person who in his presence has committed or threatens to commit an offence, or a breaker of the peace, and keep him until he can bring him before a magistrate. (Add. Torts, 404-6 ; 1 Burn's Justice, 274 ; Selw. N. P. 938.)

As a general rule, a private person may not, without warrant, arrest another for a misdemeanour, except to prevent the continuance or the threatened renewal of a

Where a private person may arrest without warrant.

PART I. breach of the peace. (Add. Torts, 102 ;  
CAP. II. Broom Com. 697.)

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Any bystander is authorised, and indeed bound, to arrest an affrayer, and deliver him over to a peace officer, to be carried before a magistrate, in order that he may be compelled to find sureties for keeping the peace. But a private individual may not do this after the affray is over, unless the affrayers remain, and there is reasonable ground for apprehending a renewal of the disturbance. If the affrayers disperse, they may not be pursued, or given in custody. (Add. Torts, 405 ; Broom Com. 697 ; 1 Burn's Justice, 276 ; Selw. N. P. 938.)

Anyone is justified, and in fact legally bound, to arrest a person who in his presence has committed or attempted to commit a felony or inflicted a dangerous wound, or to prevent a person from committing a felony, or to assist an officer demanding his help for the taking of a felon or the suppression of an affray. (1 Burn's Justice, 275 ; Selw. N. P. 938.)

A person found committing an offence against the Act relating to Malicious Injuries to Property, may be apprehended without a warrant, if taken in the very act, by any peace officer, or the owner of the property

injured, or his servant, or any person authorised by him, and taken before some neighbouring magistrate. (24 & 25 Vic. c. 97, s. 61.)

PART I.  
CAP. II.  
—

Anyone found committing an indictable offence between 9 P. M. and 6 A. M., may be apprehended by any private individual, and conveyed by him, or delivered to some peace officer to be conveyed, before a magistrate. (Add. Torts, 404; 14 & 15 Vic. c. 19, s. 11.)

Anyone found committing an offence against property under the Metropolitan Police Act, may be arrested by the owner of the property, or by his servant, or any person authorised by him, and may be detained until he can be delivered into the custody of a constable. But the offender must be arrested in the very act, and not afterwards, however recently. (Add. Torts, 407; 2 & 3 Vic. c. 47, s. 63, 66.)

Anyone found committing an offence against the Larceny Consolidation Act, may be apprehended by any person, and taken before a magistrate. And a person to whom property is offered to be sold, pawned, or delivered, if he has reasonable cause to suspect that any offence against the Act has been committed with respect to such property, may, and ought to apprehend the party offering

PART I. the same, and take him before a magis-  
CAP. II. trate. (24 & 25 Vict. c. 96. s. 103.)

Except in such special cases as these, in order to justify a private individual in causing the arrest of another, he must prove the commission of a felony, and the existence of reasonable grounds for fairly suspecting that the plaintiff either committed it or was implicated in it. (Add. Torts, 402; Broom Com. 699, 700; Selw. N. P. 937; 1 Burn's Justice, 275.)

A private individual who, without legally sufficient grounds, directs a police officer to take a person into custody without a magistrate's warrant, thereby renders himself liable to an action for false imprisonment, in which, if it is successful, heavy damages are usually given. But when a person is arrested under a warrant, the person making the charge will be safe, unless he acted maliciously and without probable cause. (Broom Com. 701; 1 Burn's Justice, 277.)

Arrest of a  
person about  
to leave Eng-  
land to  
avoid a de-  
mand.

If a plaintiff by affidavit satisfies a judge that he has a cause of action against the defendant, to the amount of 20*l.* or upwards, and that there is probable cause for believing that the defendant is about to quit England, the defendant may be ordered to be arrested and detained, until he give bail, or make a

deposit to secure the debt and costs. The person arrested, however, may apply to the Court or Judge for a discharge, which will be granted if he satisfies the Court or Judge that he has not nor ever had an intention of leaving England. Yet, notwithstanding the discharge, the party procuring the arrest will not be liable to an action, if the order for the arrest was fairly obtained. But if the plaintiff has imposed on the judge, by a *suggestio falsi* or a *suppressio veri*, the defendant may bring an action against the plaintiff for a malicious arrest. (Add. Torts, 433-4; Broom Com. 712-3; 1 & 2 Vic. c. 110, s. 3.)

PART I.  
CAP. II.

Any individual is authorised to confine a person of unsound mind, who appears likely to do harm to himself or to any other person. (Add. Torts, 408.)

Confining a  
person of un-  
sound mind.

The Court never interferes with the discretion of the jury as to the amount of damages for an assault and false imprisonment, unless they are grossly excessive, or clearly founded on a mistaken or improper view of the matter. Any circumstances of aggravation on the one hand, and any circumstances of extenuation, not pleadable as a defence, on the other hand, ought to be taken into account, to increase or lessen the damages. (Add. Torts, 429; Mayne, 263.)

Amount of  
damages.



## CHAPTER III.

## OF SECURITY TO CHARACTER AND REPUTATION.

PART I.  
CAP. III.  
—

ONE of the most precious rights concerning the person, is that of security to character and reputation. This may be injuriously affected by defamation, which is of two kinds; namely, libel and oral slander.

Defamation.

## SECTION I.

*Of Libel or Written Slander.*

Libel defined.

Libel is a slander in writing, or in print, or by pictorial or other representation. (Wharton; Starkie on Libel, Introd. ; Selw. N. P. 1049.)

Distinction in effect of verbal and written slander.

Libel is deemed a greater injury than oral slander, inasmuch as oral slander is sudden and fleeting, whereas libel is deliberate, permanent, and in general propagated farther. Hence, a vague imputation of dishonesty, if oral, is not actionable, unless the imputation

had reference to the business of the person defamed, and had the effect of damaging him in it. But such an imputation, if published in writing or in print, even without reference to his business, and without proof of any evil resulting from it, is actionable. (Add. Torts, 576; Selw. N. P. 1049.)

PART I.  
CAP. III.  
SEC. I.

A person libelled will not be entitled to an action, unless the libel be published. But parting with a libellous print or writing in order that it may become known, or the making a libel known to any third person, amounts to a publication. (Broom Com. 719, 729, 730; Selw. N. P. 1062.)

Publication.

All written or printed publications which tend to prejudice the private character or credit of another, or to render a person ridiculous or contemptible, or to cause him to be hated, feared, or avoided, or to injure him in his business, are libellous; and an action for damages is maintainable against the writer and publisher, unless the publication is a privileged communication, or the libeller can prove the truth of the libel. (Add. Torts, 578-9; Broom Com. 718-9; 3 Ste. Com. 465-8; Selw. N. P. 1049.)

What  
printed or  
written pub-  
lications are  
libellous.

Malice is the gist of an action for libel or Malice.

PART I.  
CAP. III.  
SEC. I.

---

slander. The word malice, however, is not used in the popular sense of ill-will, but in the legal sense of the intentional doing of a wrongful act; and unless the injurious communication is privileged, the law implies malice in the legal sense, and though evidence of malice may be given to increase the damages, it is never deemed necessary. In the case of what would otherwise be a privileged communication, actual malice must be proved, in order to support an action. (Add. Torts, 580; Selw. N. P. 1049, 1054, 1062; Roscoe on Evid. 567.)

Privileged  
communications.

Where a communication is fairly made, in the discharge of some legal or moral duty, or for the necessary protection or investigation of an interest, or upon some other reasonable occasion or exigency, in the belief of its truth, and without actual malice, it is privileged. (Add. Torts, 580-1, 587-8; Broom Com. 719-21, 724; 3 Ste. Com. 463, 466; Roscoe on Evid. 570, 574.)

Letters by a  
clergyman.

Defamatory letters written and published by a minister of religion, even though under the strongest sense of duty, are not privileged. (Add. Torts, 584.)

Depositions or statements in the course of

a judicial proceeding before a court of competent jurisdiction are privileged. But the libeller may be punished by a prosecution for perjury. (Add. Torts, 581; Roscoe on Evid. 571.)

PART I.  
CAP. III.  
SEC. I.

Defamatory  
matter in the  
course of  
judicial pro-  
ceedings.

Petitions and memorials to the proper authorities, complaining of the serious misconduct of magistrates and public officers and officers of the army or navy, and containing statements honestly believed to be true, are privileged communications. (Add. Torts, 582; Roscoe on Evid. 571.)

Petitions and  
memorials  
complaining  
of the con-  
duct of public  
function-  
aries.

Letters imputing grave misconduct to clergymen, addressed to the bishop of the diocese, are privileged, if sent bona fide for the purpose of obtaining an enquiry into the matter by the bishop. (Add. Torts, 585; Selw. N.P. 585.)

Letters to a  
bishop.

If a confidential communication is honestly made between relatives or friends, purely to prevent an injury, it is privileged. (Add. Torts, 585-6; Roscoe on Evid. 567, 571-2.)

Communica-  
tions be-  
tween  
friends.

In some instances, the reports of legal proceedings have been held to be actionable; as in the case of statements of counsel unsupported by evidence, or untrue, unfair, or exaggerated accounts, published after a trial is concluded, or disparaging com-

Reports of  
legal pro-  
ceedings.

PART I. ments, allegations, and opinions of the  
CAP. III. reporter himself, or of any person other  
SEC. I. than one whose duty required him to make  
— them, or matters of a grossly scandalous,  
blasphemous, or indecent nature. (Add.  
Torts, 592; Broom Com. 727-8; Selw. N. P.  
1052; Roscoe on Evid. 574.)

Information  
for members  
of Parlia-  
ment.

Information printed merely for the use of  
members of Parliament is privileged, so far  
as its circulation is confined to them. (Add.  
Torts, 594.)

Speeches of  
members of  
Parliament.

A member of Parliament, when speaking  
in his place, may freely remark upon the  
character of others; but he will be respon-  
sible in damages, if he prints and publishes  
speeches of a libellous nature. (Add. Torts,  
594; Broom Com. 728; Selw. N. P. 1052;  
Roscoe on Evid. 571.)

Reports of  
public meet-  
ings.

Those who print and publish what passes  
at public meetings are responsible for any  
defamatory matter. (Add. Torts, 594; Broom  
Com. 728-9; Selw. N. P. 1053; Roscoe on  
Evid. 575.)

Criticisms  
and com-  
ments.

Fair and candid criticism, however severe,  
on a book, or a paper, or a work of art, or an  
entertainment, is allowable; but if the com-  
ment is malevolent, and exceeds the bounds  
of fair opinion, it is actionable. (Add.

Torts, 594-5; Broom Com. 727; Selw. N.P. 1050-1; Roscoe on Evid. 575.)

PART I.  
CAP. III.  
SEC. I.

Comments on the public acts of public men are allowable, so long as they are not made a medium for private malice. (Add. Torts, 596; Broom Com. 727; Roscoe on Evid. 562; Selw. N. P. 1055.)\*

Comments  
on acts of  
public men.

## SECTION II.

### *Of Verbal Slander.*

Certain words are actionable in the case of a peer spiritual or temporal or a great officer of state, which would not be deemed so in the case of an ordinary person. (Selw. N.P. 1253.)

Scandalum  
magnatum.

Mere abuse by word of mouth, however gross, is not actionable per se, that is, without allegation and proof of special damage, unless it amounts to scandalum magnatum, or it is spoken of a professional man or tradesman in reference to his profession or business, or unless it imputes an indictable offence. (Add. Torts, 597-9; Selw. N. P. 1253-5; Roscoe on Evid. 569.)

Vituperation.

Words of mere suspicion, opinion, inquiry, advice, warning, or real regret, will not create any cause of action, as the circum-

Where the  
circum-  
stances rebut  
presumption  
of malice.

\* As to false characters of servants, see *infra*, p. 237.

PART I. stances rebut the presumption of malice.  
 CAP. III.  
 SEC. II. (Add. Torts, 598; 3 Ste. Com. 466; Roscoe  
 — on Evid. 572-4.)

Truth of the charge. And where the charge is true, it may be pleaded in justification. (Selw. N. P. 1266.)

Imputation of heresy, adultery, or unchastity. Words imputing heresy to a layman, or adultery, or unchastity, are not actionable per se, except that by the custom of London an action may be maintained in the city Courts for imputing unchastity to a woman. (3 Ste. Com. 464-5; Selw. N. P. 1255; Add. Torts, 599.)

Words actionable on account of some special damage. It is to be observed, however, that these and other defamatory words are actionable where the plaintiff alleges and proves some special damage to have resulted from them. (3 Ste. Com. 464-5; Add. Torts, 597-612; Selw. N. P. 1259-60.)

Imputation of a contagious disease. To affirm that a person has a contagious disease, the imputation of which may exclude him from society, is actionable. (Add. Torts, 598; 3 Ste. Com. 465; Selw. N. P. 1254.)

Words injurious to a man in his profession or business. Words spoken of a professional man or a tradesman, in reference to his profession or business, imputing misconduct or gross ignorance or incapacity, and calculated to injure him in it, are actionable. (Add. Torts, 598-9; 3 Ste. Com. 465; Selw. N. P. 1258.)

Words directly tending to injure a clergyman in his profession, and to subject him to a loss of emolument, are actionable. (Add. Torts, 600.)

PART I.  
CAP. III.  
SEC. II.  
—

Words are actionable where they impute to a person in office some specific misconduct or unfitness. If they amount only to a vague imputation of general misconduct or unfitness for his situation, they will fail to support an action, without proof of special damage. (Add. Torts, 600 ; Selw. N. P. 1258.)

If any special damage has resulted immediately and naturally from the utterance of slanderous words, an action for damages is then maintainable, even though the utterer was not the author of the scandal, but merely repeated what he had heard. But the original utterer of slanderous words is not responsible in damages for the subsequent repetition of them, except by persons who had an authority from him to repeat them, or were under an obligation to do so. (Add. Torts, 601-4 ; Roscoe on Evid. 576.)

Repetition of  
a slander.

A person will be responsible for a slanderous imputation, though made in the belief of its truth, in answer to an enquiry. (Add. Torts, 604.)

Slanderous  
imputation  
in answer to  
enquiry.

We have seen that many communications



PART I.  
CAP. III.  
SEC. II.

Malice in ordinary cases, and in the case of privileged communications.

of a defamatory nature are privileged, even when by way of libel. And, à fortiori, many such communications are privileged when they are merely oral. But although the making of a charge may be justified by the occasion, yet it may be accompanied by such expressions, and may be made under such circumstances, as furnish proof of actual malice, and in such case it will be actionable. (Add. Torts, 605; Selw. N. P. 1254, 1266-7.)

In ordinary actions for slander, malice, that is, malice in the legal sense, is presumed from the publishing the slanderous matter; but in the case of what would otherwise be privileged communications, actual malice must be proved, in order to render them actionable. (Selw. N. P. 1254; Roscoe on Evid. 567.)

Communications made in prosecution of crime.

Defamatory statements are privileged, if bonâ fide made, on an inquiry into a supposed crime. (Add. Torts, 605.)

Liberty of counsel.

Counsel may make any calumnious imputation which the circumstances before the Court, even though untrue, appear to warrant. But they ought not maliciously to utter words wholly unjustifiable. (Add. Torts, 605.)

Judges and magistrates are not responsible for defamatory expressions uttered by them, if material and relevant to a cause or matter in issue before them, which is within their jurisdiction. (Add. Torts, 607.)

PART I.  
CAP. III.  
SEC. II.

Liberty of  
judges and  
magistrates.

In actions for defamation, words are now construed according to their popular meaning; and that meaning, and not the meaning of the person uttering them, is the test of their being actionable. (Add. Torts, 607; Selw. N. P. 1256.)

Interpreta-  
tion of slan-  
derous ex-  
pressions.

If a man falsely and maliciously slanders the title to lands or chattels about to be sold, and people are thereby deterred from buying, or are led to give a less price, the owner will be entitled to compensation in damages. (Add. Torts, 608; Broom Com. 733-4; 3 Ste. Com. 467; Selw. N. P. 1258, 1269; Roscoe on Evid. 578.)

Slander of  
title.

The jury may give damages not only in respect of any loss arising from the libel, but also for the mental suffering caused to the person libelled. And any damages may be given which are not manifestly outrageous. (Add. Torts, 627; Mayne, 273.)

Damages.

One libel cannot be set up against another, as a defence; nor can it be set off in reduction of damages, unless the libel by the

PART I. plaintiff may be regarded as the provoking  
CAP. III. cause of the libel by the defendant. (Add.  
SEC. II. Torts, 628 ; Roscoe on Evid. 577 ; Mayne,  
281.)

If the defendant offered an apology, it may be given in evidence in mitigation of damages. (Add. Torts, 628-9 ; Broom Com. 721 ; Roscoe on Evid. 577.)

Usual course  
in actions for  
libel.

The Judge usually gives a definition of libel, and then leaves it to the jury to say whether the facts necessary to constitute the offence so defined are proved. And the Judge may, if he thinks fit, give his own opinion, as a matter of advice to the jury. (Add. Torts, 629 ; Broom Com. 730-1 ; Roscoe on Evid. 562.)

## CHAPTER IV.

OF EXEMPTION FROM PERSONAL ANNOYANCE  
GENERALLY.

BESIDES corporal security, corporal liberty, and security to character and reputation, everyone has an inherent right to an exemption from vexatious annoyance generally. Under this head it may suffice to mention one form of vexatious annoyance, namely, that of the malicious suing out of legal process.

PART I.  
CAP. IV.

A person is liable to an action, if he puts the criminal law in motion, or causes a search warrant to issue, maliciously and without reasonable or probable ground for such a proceeding. Malice is ordinarily implied from the absence of any such ground; and even if there was reasonable or probable ground, yet, if the defendant did not know it, or did not believe that the plaintiff was guilty, malice may be inferred, in the technical sense of the word, in which it is to be understood in such a case. (Add. Torts,

Malicious  
prosecution.

PART I. 435-41; Broom Com. 715-7; Selw. N. P.  
CAP. IV. 1071-3, 1079-80; Roscoe on Evid. 580-1.)

— A person who petitions for an adjudication in bankruptcy, maliciously and without reasonable or probable cause, and knowingly and wilfully or recklessly swears to depositions false in fact, is liable to an action for a malicious prosecution, if the proceedings were superseded or set aside before the commencement of the action. (Add. Torts, 443; Broom Com. 715; Selw. N. P. 1077.)

In order to recover damages for a malicious prosecution, the plaintiff must show that the proceeding was determined in his favour, though he may not have been actually acquitted, and that he suffered in person, in reputation, or in point of expense. (Add. Torts, 455; Selw. N. P. 1073; Broom Com. 717; Mayne, 259.)

PART II.

OF PRIVATE RIGHTS AND WRONGS CONCERNING THE  
SUBJECTS OF PROPERTY, AS COGNIZABLE  
AT COMMON LAW.

## . TITLE I.

### OF CONTRACTS.

**PART II.** A PROMISE, as distinguished from a contract, is an engagement by one person to another, made by the former voluntarily and independently of any concurrence on the part of the latter. (2 Ste. Com. 53-4.)

**TIT. I.**  
 Promise distinguished from a contract.

Definition of a contract.

A contract is an agreement, that is, a promise made on one side, and assented to on the other. In point of form, it may be either unilateral, that is, made by one party only, or it may be made inter partes, i. e. between two or more parties. (See 2 Ste. Com. 53-4 ; Broom Com. 252, 269 ; Add. Cont. 2.)

Express and implied contracts.

A contract may be either express or implied. An express contract is one the terms of which are expressed. An implied contract is one which the law, on principles of reason and justice, presumes. (Broom Com. 252-4 ; 2 Ste. Com. 56 ; Add. Cont. 17 et seq.)

Executed and executory contracts.

A contract may be either executed or executory, or executed as to one of the parties, but executory as to the other. An executory contract is one in which a party

binds himself to do or not to do a particular thing. An executed contract is one in which the main object of contract is actually performed. (See Broom Com. 253; 2 Ste. Com. 57.)

PART II  
TIT. I

Contracts are of three kinds: 1. Contracts by matter of record; 2. Contracts under seal, which are termed specialties; 3. Contracts not under seal, which are called simple contracts. (Sm. Cont. 2; Add. Cont. 2; Broom Com. 261.)

Division of  
contracts.

Contracts by matter of record are contracts acknowledged in open Court, and recorded in the presence of the party making the acknowledgment. They are seldom used, with the exception of cognovits and recognisances. (See Sm. Cont. 3; Broom Com. 261; Add. Cont. 2.)

Contracts of  
record.

A cognovit is a written confession of an action to which the defendant has no available defence, supposed to be given by the defendant in Court, and authorising the plaintiff, under certain circumstances, to enter up judgment, and issue execution thereon against the defendant.

Cognovit.

A recognisance is an obligation of record entered into, either to the Crown or a subject, before some Court of Record or magistrate

Recogni-  
sance.



**PART II.**  
**TIT. I.**

Characteris-  
tics of con-  
tracts of re-  
cord.

duly authorised, with condition to do some particular act. (Broom Com. 261; Wharton.)

Contracts of record have this peculiarity, that they prove themselves, i. e. the bare production of the record is sufficient evidence of the existence of the contract; and they may be enforced by *scire facias*. (Sm. Cont. 3, 4; Add. Cont. 2.)

Contracts  
under seal.  
Their cha-  
racteristics.

A contract under seal is a written or printed contract sealed and delivered as a deed. Such a contract requires no consideration to support it, as between the parties to it, if it is a deed *inter partes*, or as between the obligor and obligee, if it is a bond. It will be binding on the heir and the devisee of the covenantor or obligor, where the heir is named in the covenant or bond, and takes assets by descent. And it can only be discharged by that which is of as high a nature as itself, that is, by a deed, or by a judicial or legislative act. (See Broom Com. 272, 293, 297; Sm. Law of Prop. 446-8, 759-63, 773-80.)

Simple con-  
tracts.

A simple contract is a contract by writing not under seal, or by word of mouth, or by implication from conduct. (Sm. Cont. 32, 34; Add. Cont. 3.)

Their cha-  
racteristics.

Simple contracts differ from contracts under seal in all these particulars: They do

not create an estoppel, except in some few cases, though they operate as an admission. They require a consideration to support them. They form no ground of action against the heir or devisee, even though he be expressly named in them, but bind the personal representative. And they may be put an end to without a deed, judgment, or Act of Parliament. (Sm. Cont. 34, 127-8; Broom Com. 272, 303, 421-2; Add. Cont. 4, 5.)

PART II  
TIT. I.  
—

If, after a simple contract security is given, a security by specialty between the same parties is given in relation to the same subject-matter, the right of action on the former becomes merged in the right of action on the latter, if the remedy by the latter is coextensive with the remedy by the former, except, perhaps, where there is an intention, expressed on the face of the deed, that the previous security should remain in force. (Broom Com. 278-82; Sm. Cont. 23.)

Merger of  
simple con-  
tracts.

Although the word 'parol' is often used to signify that which is oral, as opposed to that which is written, yet the expression 'parol agreement' is used to denote an agreement, whether written or verbal, which is not by specialty, that is, not by deed. (See Broom Com. 370; 2 Ste. Com. 54.)

Parol  
agreement.

PART II  
TIT. I.

Requisites to  
a contract.  
Terms must  
be definitely  
settled.

In order to constitute the foundation of a legal right, the terms of a contract must be definitely and completely arranged, except that it is not essential in all cases to specify the mode or time of payment, or even the price itself. (Broom Com. 303-5.)

Mutual as-  
sent neces-  
sary.

In every contract, whether unilateral or inter partes, there must also be a mutual assent, express or implied: so that if the contract merely professes to be an agreement by one person for the benefit of another, and there is no assent or acceptance on the part of the latter, it will not bind. And the assent must be to the same thing and to the precise terms offered: so that where one party makes a proposal, and the other accepts, subject to some variation or condition, the former is of course not bound by the acceptance. (See Sm. Cont. 120-2; Broom Com. 255; 2 Ste. Com. 53-4; Add. Cont. 15, 16.)

Rescission of  
an offer.

An offer may be withdrawn at any time before it is completely and unconditionally accepted, but not afterwards. (Sm. Cont. 123; Add. Cont. 16.)

Posting a  
letter of ac-  
ceptance.

The contract is complete as soon as a letter containing an acceptance of a proposal is posted, though it may never reach its destination. (Broom Com. 305; Add. Cont. 16.)

By the 4th section of the Statute of Frauds, **PART II.**  
29 Car. II. c. 3, no action shall be brought— **TIT. I.**

(1) upon a promise by an executor or administrator to answer damages out of his own estate; or (2) upon any promise to answer for the debt, default, or miscarriage of another; or (3) upon an agreement made in consideration of marriage (which does not apply to promises to marry); or (4) upon a contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or (5) upon any agreement not to be performed within the space of a year after the making thereof—unless the agreement upon which the action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith, or some other person by him lawfully authorised. (Broom Com. 375, 386; Sm. Cont. 64, 67; Add. Cont. 50-64.)

Where the contract must be in writing, signed.

And by subsequent enactments, an acknowledgment or promise, without writing signed by the party chargeable or his agent duly authorised, will not revive a debt barred by the Statute of Limitations, or confirm one contracted during infancy. (2 Ste. Com. 55-6; 9 Geo. IV. c. 14, s. 1, 8; 19 & 20 Vic. c. 97, s. 13.)

PART II.  
TIT. I.  
—

In cases within these statutes, the consideration, as well as the parties, and the subject-matter of an agreement, must appear by express terms in writing, or by necessary implication from a written instrument, in each of the five cases to which the 4th section of the Statute of Frauds relates, except the second case, in which, in consequence of another enactment, the consideration may be proved orally. (Broom Com. 376-7, 380-1; Add. Cont. 61; 19 & 20 Vic. c. 97, s. 3.)

The 4th clause of the 4th section of the Statute of Frauds applies to any agreement for or relating to the alienation of an interest in land. (See Broom Com. 387.)

A contract for the sale of grass, wood, or fruit, as growing produce, is a contract for the sale of an interest concerning land. But a contract for the sale of grass, wood, or fruit, when severed, or by the terms of the contract intended to be severed, from the freehold, or of other produce not arising spontaneously, but by labour and industry, whether growing or severed, is not a contract for the sale of an interest concerning land. (Sm. Cont. 97-8; Add. Cont. 50-1; Broom Com. 388-9.)

By the 2nd section of the Statute of Frauds,

leases for not more than three years, at a rent of not less than two-thirds of the improved value, are excepted from the 1st section, which requires leases to be in writing; but yet, in consequence of the 4th section, an agreement for such a lease cannot be enforced unless in writing. (Sm. Cont. 102; Broom Com. 387; Add. Cont. 48.)

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TIT. I.  
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The last branch of the 4th section of the Statute of Frauds does not apply to an agreement which may or may not happen to be performed within the year, nor to an agreement which is to be completely performed within the year by one of the parties, though not by the other. (Sm. L.C. 283; Sm. Cont. 104-7; Broom Com. 391-2; Add. Cont. 57-8.)

In a simple contract, there must have been a consideration moving from the contractee, or some one influenced by him, to the contractor—a request to the contractee, by the contractor, to do, or induce some one else to do, the thing constituting the consideration—a promise to the contractee, by the contractor, grounded on such consideration. (Broom Com. 308, 317, 331-2; 2 Ste. Com. 58-61; Sm. Cont. 137.) But, as we shall presently see, the request and the promise are sometimes implied by the law.

Three ingredients in a simple contract.

**PART II.** consideration is one which, though commenced at a past time, continues to subsist at the date of the contract.  
**TIT. I.**

**Necessity for a request.**

An executed consideration must be founded on a previous request, expressed or implied, to the contractee by the contractor, to do the act constituting the consideration; for it would not be right to place another under a legal obligation grounded on a mere gratuitous act. An executory consideration implies a previous request by the contractor; as where A. promises to remunerate B., if B. will perform a certain thing. (Sm. Cont. 155-6; Broom Com. 308-10, 324; 3 Ste. Com. 59.)

**Where the request or the promise is implied.**

The cases of executed consideration in which a previous request is implied, are:

1. Cases in which the plaintiff or person charging has been compelled to do that which the defendant or person charged ought to have done, and was compellable to do.
2. Cases in which the defendant or person charged has taken the benefit of the consideration, or otherwise adopted the contract.
3. Cases in which the plaintiff or person charging has voluntarily done that which the defendant or person charged was compellable to do, and the latter has afterwards ex-

pressly promised to repay or indemnify him. 4. Cases of money lent, as distinguished from cases of money disbursed for another without request. 5. When the consideration moving from the plaintiff or person charging, and the promise of the defendant or person charged, were simultaneous. 6. When the consideration is continuing.

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TIT. I.  
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In the first two cases the law implies the promise as well as the request; but in the third case there must be an express promise. (Sm. Cont. 158-65; Broom Com. 309-10, 313, 315-6, 325; Add. Cont. 11.)

If one requests another to pay money for him to a stranger, in discharge of a debt due from him, or as a gift or loan from him, to such stranger, there is an implied undertaking to repay it, on the part of him who makes the request; so that, if the request is acceded to, the amount is a debt due to the person paying from the person at whose request it is paid. And where one person, for and at the request of another, subjects himself to a legal liability to pay money, the law implies a request to the former by the latter actually to pay the money, when necessary. (Broom Com. 310-11; Add. Cont. 23.)



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TIT. I.

Where the consideration will not support an express promise.

Where the law implies a certain promise from a consideration executed, such implied promise is deemed to exhaust the consideration; so that the consideration will not support any express promise in addition to the implied promise. (Sm. Cont. 166; Broom Com. 326.)

Illegal contracts.

Every contract, whether it be a contract by deed or a simple contract, is void, if it immediately grows out of an illegal act, or stipulates for the performance of an illegal act, or if it is founded upon an illegal consideration. So that, even a deed which is good on the face of it may be avoided by adducing evidence of such illegality. (Sm. Cont. 167-8; Broom Com. 350-5; Add. Cont. 888-9.)

In the case of a promise to do several acts, some legal and others illegal, the contract is void as to the illegal acts only, if they are separable from the legal. But illegality in any part of the consideration renders the whole contract void. (Sm. Cont. 168; Broom Com. 352-3; 1 Sm. L. C. 333.)

Two kinds of illegality.

Illegality is of two sorts — illegality of a statutory kind, and illegality by the unwritten law, whether common law or equity.

A contract which is illegal by the un-

written law is usually deemed so on one of two grounds: 1st, because it is tainted with fraud or violates morality; 2ndly, because it is opposed to the policy of the law or public policy. (Sm. Cont. 169; Broom Com. 350-69; 2 Ste. Com. 60; Add. Cont. 888.)

PART II.  
TIT. I.

Illegality by  
the unwritten  
law.

As a general rule, contracts which have a tendency to interfere with the due administration of public justice are void. (Sm. Cont. 188; Broom Com. 355, 359; Add. Cont. 892.)

Contracts  
interfering  
with justice.

When a contract is founded in that sort of fraud of which the Courts take cognisance, it may be avoided, even at law, by the party defrauded, if he disaffirms it as speedily as may be. But there are some species of artifice which, though moral frauds, are not frauds for which redress is given at law or in equity. (Broom Com. 333-6; Add. Cont. 906.)

Fraud.

If a falsehood is told, whereby a third person is prejudiced, although there may be no profit to the person who tells it, and no injury was intended to the party to whom it is told, but a benefit to a third person, it is a fraud which will support an action of deceit. (Broom Com. 338.)

Falsehood.

And if a person who has no knowledge on

**PART II.** the subject represents a certain state of facts  
**TIT. I.**  
 ——— to exist, with a view to secure some benefit to himself, or to deceive a third person, he is guilty of a fraud, for which redress may be had, even at law. (Broom Com. 339.)

But fraud is not a ground of an action, unless it prejudiced the plaintiff; nor can it be set up as a defence, unless it induced the defendant to enter into the contract. (Broom Com. 340; Add. Cont. 906.)

**Contracts of immoral tendency.** The parties to contracts of immoral tendency cannot sue upon them. Thus, future illicit cohabitation is an illegal consideration, and a contract founded on it is void. And past cohabitation or previous seduction, though not an illegal consideration, is no consideration on which a simple contract can be founded. (Broom Com. 367; Add. Cont. 889-90.)

**Contracts by persons who are not free agents.** Where a person is led to contract through fear of loss of life or limb, or of being deprived of his liberty, the contract is void, even at law. (Broom Com. 590-1.)

**Contracts by infants.** Contracts to an infant's prejudice are void. Contracts which are necessary and for his benefit, are valid. Contracts which do not fall distinctly under these descriptions are voidable: these he may by confirmation,

or, in some cases, by mere acquiescence, after he becomes of age, render himself liable to perform. (2 Ste. Com. 312-13; Add. Cont. 941-3; Story's Eq. § 341; Burton, § 199.) So that if an infant enters into a contract, except for necessities, no action can be maintained against him during his infancy; but the contract, if it may be for his benefit, is not absolutely void, but voidable. If he does not confirm it after he attains his majority, it cannot be enforced against him. But if he confirms it, he will become liable to an action upon it. (Sm. Cont. 273; Add. Cont. 442-3; Broom Com. 566.)

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TIT. I.  

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No action can be maintained to charge a person upon any promise made after full age to pay a debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification be in writing, signed by the party to be charged therewith, or his agent duly authorised. (Sm. Cont. 117; Add. Cont. 942.)

An infant, living under his parents' roof, is not ordinarily liable for the price even of necessities ordered by him, as the law assumes that these are provided for him. But if he is an orphan, or if he is residing at

PART II.  
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a distance from his parents, and is not provided with necessaries by them, he may bind himself for necessaries, such as food, apparel, medicine, and instruction, according to his station. (Add. Cont. 938-40; 2 Ste. Com. 312; Story's Eq. § 240; Sm. Cont. 260-9; Broom Com. 566, 569-71; Burton, § 199.)

An infant cannot bind himself by borrowing money even for necessaries, nor by any mercantile contract, as by a bill or note, nor by stating an account, nor by a bond in a penalty, even for necessaries. (Sm. M. L. 18; Sm. Cont. 270; Broom Com. 567; Add. Cont. 937.)

An adult who contracts with an infant is bound, although the infant be not. (Sm. Cont. 279; Add. Cont. 937.)

Contracts  
and other  
acts of per-  
sons of un-  
sound mind.

When a person who is apparently of sound mind, and not known to be otherwise, enters into a fair and bona fide and executed contract for the purchase of property, and it has been paid for and fully enjoyed, and cannot be restored so as to put the parties in statu quo, such contract cannot afterwards be set aside, either by the alleged lunatic or those who represent him. (Phillips, 17; Broom Com. 588.)

In the case of contracts or other acts, however solemn, of persons who are idiots,

lunatics, or otherwise of unsound mind, wherever, from the nature of the transaction, there is not evidence of entire good faith, or it is not seen to be just in itself, or for the benefit of those persons, Courts of Equity will set it aside, or make it subservient to their just rights and interests. But where there is entire good faith, and the contract or other act is for the benefit of such persons, as to provide them with necessaries, there both Courts of Law and Courts of Equity will uphold it. (Sm. Manual, 62.) So that a lunatic is liable upon a reasonable executed contract for articles suitable to his degree, supplied by a person who was not aware of his lunacy. (Sm. Cont. 294; Add. Cont. 945; Broom Com. 586; Phillips, 17, 18.)

A person contracting whilst manifestly so intoxicated as not to know the consequences of his entering into the contract, is not liable, even at law, and even though the contract is by deed, unless it is for necessaries which he consumes or keeps after he becomes sober. (Broom Com. 589-90; Add. Cont. 944.)

And if a person, at the time of entering into a contract or doing an act, was so excessively drunk as to be deprived of the use of his understanding, or if there was any

Contracts by  
intoxicated  
persons.

**PART II.** contrivance or management to lead him to  
**TIT. I.** drink, or some unfair advantage taken of his  
 ——— intoxication, Courts of Equity, so far from  
 lending their assistance to the person who  
 obtained an agreement or deed from him  
 when so intoxicated, will assist him in get-  
 ting rid of it, on account of the fraud of the  
 other party in obtaining such agreement or  
 deed from a person in such a state, or by  
 such means, unless the contract were for  
 actual necessities. (Sm. Manual, 63; Sm.  
 Cont. 299; Broom Com. 590.)

Contracts by  
 aliens.

Alien friends may enter into a contract  
 with British subjects, and may sue on such  
 contract in the Courts of this country. If  
 the contract was made in England, it is ex-  
 pounded according to the law of England;  
 if abroad, according to the law of the foreign  
 country where it was made; but the plaintiff  
 can only have the remedy which the law of  
 England affords. (Sm. Cont. 300-1.)

All contracts by alien enemies, i. e. aliens  
 whose Government is at war with this  
 country, are void, except that they may be  
 sued upon their contracts, though they  
 cannot sue. (Sm. Cont. 303; Broom Com.  
 592; Add. Cont. 934.)

Contracts by  
 outlaws.

Outlaws and persons under sentence for

felony are, for the time being, disabled from enforcing contracts, but are liable upon them. (Sm. Cont. 304; Broom Com. 592.)

PART II.  
TIT. I.

Contracts which are inconsistent with public duties; agreements tending to secure persons against the consequences of illegal acts; agreements whereby a person who has no interest in a matter in litigation agrees to aid in it (which is called maintenance); agreements whereby a person who has no interest in a matter in litigation contracts for a share of the fruits thereof (which is called champerty); agreements contravening the object of legislative enactments; and all other contracts which are injurious to public welfare, are also void. (See Sm. Cont. 191 et seq.; Broom Com. 357-8, 360; Add. Cont. 891-2, 894, &c.; Tapp on Mainten. 19, 20.)

Illegal contracts generally.

Wherever any contract or conveyance is void, either by a positive law or upon principles of public policy, it is deemed incapable of confirmation; it being a maxim, *Quod ab initio non valet, in tractu temporis non conualescit*. But where it is merely voidable, or turns upon circumstances of undue advantage, surprise, or imposition, there, if it is deliberately and upon full examination con-

Distinction between void and voidable transactions, as regards confirmation.



PART II. **firm**ed by the parties, it will be valid. (Sm.  
TIT. I. **Manual**, 68.)

Motive or  
animus in  
cases of  
breach of  
contract.

In an action on contract, the motive or animus of the defendant is immaterial, because the breach of the agreement renders the party guilty of it liable, ipso facto, for the direct pecuniary loss resulting therefrom; and the damages are limited to that. (Broom Com. 342-3.)

Assignment  
of a con-  
tract.

As a general rule, a contract is not assignable at law, i. e., the benefit of a contract cannot be transferred at law so as to put the transferee in the place of the transferor, and entitle the transferee to maintain an action upon the contract in his own name; but the transferee may sue in the name of the transferor. (Sm. Cont. 248; Add. Cont. 796-7.)

How a con-  
tract ought  
to be evi-  
denced and  
construed.

When an agreement has been reduced into writing, it must be proved by the writing alone, without reference to any prior or contemporaneous verbal expressions which would alter, add to, or take away from its import, or show its meaning to be different from what its words import. (Sm. Cont. 35-6, 39; Broom Com. 371, 491; Add. Cont. 1019.)

But it may be shown that it was subsequently waived, annulled, added to, or varied, even verbally, where a writing was not

necessary in the first instance. But where by statute a written contract is necessary, the whole of the contract must be in writing; so that written contracts made pursuant to a statute cannot afterwards be varied by word of mouth. (Sm. Cont. 40-1; Broom Com. 371-2, 374.)

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TIT. I.  
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Where parties have contracted with reference to some known and established usage, the contract is construed with reference to such usage, so long as it is not inconsistent with the express language of the written contract. (Sm. Cont. 45-7; Broom Com. 498-9, 502, 504; Add. Cont. 1027.) And the meaning of the terms used may be explained by evidence, where they are terms of business, art, or science, or of peculiar signification among a particular class of persons. (Sm. Cont. 54, 58; Broom Com. 496-500, 504; Add. Cont. 1027-8.) Extrinsic evidence may also be resorted to for the purpose of annexing to a written contract that which constitutes an ordinary incident, according to the usage of trade, or the custom of the country, or the common law, provided it is not inconsistent with the terms of the written instrument. (Broom Com. 500-1; Add. Cont. 1027.)

PART II.      The existence of such usage, meaning, or  
TIT. I.  
— incident, is matter of fact, which is a question  
for the jury, and must be established by  
clear and positive proof, either written or  
oral, and not by mere opinions of witnesses.  
But when such usage, meaning, or incident  
is so ascertained by the jury, the construction  
of the instrument, in these as in other cases,  
belongs to the Judge. (Sm. Cont. 453-4;  
Broom Com. 499, 505-9.)

Whether in a Court of Law or in a Court  
of Equity, all written contracts are construed  
favourably, so as to support and effectuate  
the apparent intention of the parties, as far  
as possible, consistently with the rules of  
law. The intention, however, must not be  
imputed by mere conjecture, but (subject to  
the preceding remarks) it must be collected  
from the instrument itself; and in general  
no construction is to be made contrary to  
the words; and the words are to be con-  
strued in their strict and proper sense, where  
they are capable of being carried into effect  
in that sense, unless from the surrounding  
circumstances it is plain that the parties in-  
tended to use them in some other sense.  
And the construction should be made not  
merely upon particular words or parts, but

upon the entire instrument, so as to give PART II.  
effect, if possible, to every part and every TIT. I.  
word, as well as to the evident object and  
intent, without violence to any word or part.  
(Sm. Law of Prop. 818-21; Sm. Cont. 451-7;  
Add. Cont. 1024-7.)

## TITLE II.

## OF INJURIES TO PROPRIETARY RIGHTS.

## CHAPTER I.

## OF INJURIES TO REAL PROPERTY.

PART II. THE injuries to real property are principally  
 TIT. II. six : 1. Ouster ; 2. Trespass ; 3. Nuisance ;  
 CAP. I. — 4. Waste ; 5. Subtraction ; 6. Disturbance.

I. *Of Ouster.*

Ouster, how  
 effected.

1. Ouster is the deprivation of the possession. It is effected by abatement, intrusion, disseisin, or deforcement. (3 Ste. Com. 473-6.) Abatement is a wrongful entry by a stranger, on the death of the owner of the inheritance. Intrusion is a wrongful entry by a stranger, on the determination of a particular estate of freehold, before the remainderman or reversioner enters, or a wrongful entry on the demesnes of the Crown, and taking the profits thereof. Disseisin is the wrongful putting out of a person seised of the freehold in actual possession. De-

forcement is a detainer of the freehold from the person entitled, in other cases. (Sm. Law of Prop. 485-6.)

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CAP. I.  
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## II. *Of Trespass.*

In a wide sense, a trespass is an injurious act, not amounting to treason or felony. (Add. Torts, 139; Wharton.)

Definition of  
a trespass.

But a trespass on land, in the generic sense of the term land, is an unwarrantable entry on it, or an unwarrantable use of it, either personally or by one's servants or cattle. (See Selw. N.P. 1295; 3 Ste. Com. 487, 489; Roscoe on Evid. 613.)

Thus, the throwing a heap of stones, or pouring water out of a pail, or planting posts or rails, on another's land, and even the mere walking upon it, without damage to the soil or grass, is a trespass. (Add. Torts, 139, 142-3.)

Instances of  
trespass.

If buildings are tortiously and permanently injured by a third person, the tenant may sue in respect of the injury in a residential point of view, and the reversioner in respect of the diminution in the saleable value of the property. (Add. Torts, 158.)

Action by  
tenant and  
reversioner  
for injury to  
buildings,

Where trees are injured, damages are recoverable by the occupier and by the reversioner: damages for the loss of shade,

and for in-  
juries to  
trees.

PART II. shelter, and fruit, by the former ; damages  
 TIT. II. for the loss of the timber, by the latter. (Add.  
 CAP. I. Torts, 181 ; Mayne, 238.)

Destroying  
 dogs and  
 cats.

A person who destroys another's dog or cat is in general liable to an action ; and if dogs or cats are attracted to a trap by strong-smelling meats, though the trap were set for foxes and vermin, the person who set the trap is liable. (Add. Torts, 80 ; Dixon, 295.)

Expelling a  
 trespasser.

A mere trespasser may be forcibly ejected, unless he is permitted to remain without effort to remove him, in which case he will gain a possession. (Add. Torts, 141.)

Damages for  
 trespass.

In actions for trespass, the jury are not limited to the actual injury inflicted, and may take all the circumstances of aggravation into account. (Roscoe on Evid. 615 ; Mayne on Damages, 242.)

Thus, substantial damages may be recovered against a wilful intruder into a dwelling-house, though no actual injury has been done either to person or property. (Add. Torts, 179.)

### III. *Of Nuisances.*

A nuisance has been already defined.  
 (See p. 6.)

A person will become liable to an action for a nuisance, by erecting a building which overhangs another's house or land, or by fixing a spout or projection which tends to cause a quantity of water to descend on another's house or land, or by setting up a noisy, noxious, or offensive trade, such as a smith's forge, a brewery, a soap-boilery, a tallow-furnace, or a dye-house, unless it is in a place when it does not amount to a nuisance to the party complaining, or the person exercising it can establish a prescriptive right, by showing that he has exercised it without molestation or interruption in the same manner for twenty years. So a person will be liable by erecting a privy or hogstye, or allowing the filth of his cesspool or drain to percolate through his neighbour's land and contaminate the water of his well or spring, or to enter the drain for waste water through his neighbour's land. (Add. Torts, 74-5, 78-9; Broom Com. 757-8; Selw. N.P. 1129; 3 Ste. Com. 491-2; Gale on Easements, 388, 404, 406-8; Bamford v. Turnley, 10 W.R. 803.)

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CAP. I.

Injurious  
affecting  
another's  
property, or  
his reason-  
able enjoy-  
ment of it.

If a man erects a building so close to the house or other building of another as to prevent the latter from enjoying the light so freely as he used, he may have redress, if he



PART II.  
TIT. II.  
CAP. I.

has been in the enjoyment of the light to his house or other building for twenty years, or if the person affecting his light were the person from whom he purchased the house or other building.

And so, if a man injures the grass or corn or cattle of another, or obstructs the private way, or, in any other manner besides that already mentioned, corrupts, or diverts, or prejudicially affects the water course of another, it is a nuisance, for which the law will give a remedy.

Remedy in damages.

The remedy at law, in all these cases, is by action on the case for damages.

No action for reasonable customary use of a right;

But an action cannot be maintained for the reasonable use of a right in a place where it has been customary to exercise it, as in the case of a butcher's shop or a brewery, although it may be to the annoyance of another. (Selw. N.P. 1129; 3 Bl. Com. 13; Broom Com. 757-8; Gale, 406, 408.)

nor for diminishing another's pleasure.

Nor can an action be maintained on the mere ground that the cause of action diminishes the pleasure of the party affected by it. So that the building of a wall which merely shuts out a prospect, without obstructing the light, or the opening of a window, which destroys the privacy of another, is not ac-

tionable. (Selw. N.P. 1130; 3 Ste. Com. 491-2; Gale, 285.)

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CAP. I.

A person who pulls down a house or wall which touches the house or wall of another person, is liable for any damage arising from want of due care and skill and proper precautions. And if a person makes an excavation on his land close to his neighbour's house, in an improper manner, or without giving his neighbour notice and opportunity to protect it, he will be responsible for any damage thereby occasioned, if his neighbour's house has been erected long enough to have acquired a right of support. (Add. Torts, 86-7; Roscoe on Evid. 526, 528; Gale, 314. And see p. 101, *infra*.)

Endangering  
another's  
buildings.

A person is responsible for damage occasioned by his bringing explosive materials into a building. And a tenant is responsible for any accident from gas, arising from not properly turning the stopcocks. And the gas company is not bound to stop the supply, on receiving notice that no more gas is required; but it is the business of the occupants to prevent it from entering, if they wish to exclude it. (Add. Torts, 132-3.)

Explosive  
materials.

Gas.

Whenever the enjoyment of a right incident to the possession of land has been

Damages for  
the obstruction  
of a  
right.

PART II. tortiously obstructed, and the repetition of  
 TIT. II. the tortious act would tend to establish an  
 CAP. I. — adverse legal right, substantial damages are  
 recoverable, even though no actual damage  
 of any other kind has been sustained. (Add.  
 Torts, 14; Mayne, 256.)

Damages re-  
 coverable by  
 lessee and  
 reversioner.

Damages are recoverable by a lessee in  
 respect of an injury by a tortious act to his  
 possessory interest; and if the repetition of  
 the act would tend to the establishment of a  
 prescriptive right permanently injurious to  
 the inheritance, or if the nuisance is otherwise  
 permanent or injurious to the reversioner,  
 damages are also recoverable by the rever-  
 sioner. (Add. Torts, 15; Roscoe on Evid.  
 513; Mayne, 256.)

#### IV. *Of Waste.*

Definition.

Waste is that which tends to the permanent  
 depreciation of the value of the inheritance.  
 It is either voluntary, which is an offence of  
 commission, as by pulling down a house; or  
 it is permissive, which is an offence of  
 omission only, as by suffering it to fall for  
 want of necessary repairs. (Co. Litt. 53. a.;  
 2 Bl. Com. 281; Burton, § 718.)

Voluntary waste chiefly consists in these  
 things:—1. Felling or destroying trees. 2.

Destroying or injuring buildings. 3. Opening mines or pits. 4. Altering the property. 5, Destroying heirlooms. (1 Cruise T. 3, c. 2, § 1.) 6. Destroying certain kinds of living creatures which are regarded as part of the inheritance.

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TIT. II.  
CAP. I.  
—

1. A tenant for life may cut down timber trees for the ordinary reparation of houses or fences; but he cannot cut down timber to build new houses or to repair those that he himself has improperly suffered to fall into decay. (1 Cruise T. 3, c. 1, § 19; Co. Litt. 53. b.) Timber trees are those which serve for building or reparation of houses, such as oak, ash, and elm, of the age of twenty years and upwards. (1 Cruise T. 3, c. 2, § 5; 2 Bl. Com. 281; Co. Litt. 53. a.) By the custom of some countries certain trees not usually considered as timber are deemed to be such; as being there used for building. (1 Cruise T. 3, c. 2, § 6; 2 Bl. Com. 281; Co. Litt. 53. a.)

1. Waste in trees and hedges. For what purposes tenant for life may cut timber.

What is timber.

If a tenant for life suffers the young germins or shoots to be destroyed, or cuts down willows, birch, &c., standing in the defence and safeguard of a house, or fruit trees standing in a garden or orchard, or suffers a quickset fence of white thorn to be stubbed

Destruction of germins, trees about a house, fruit trees, and fences.

PART II. up or destroyed, it is waste. (1 Cruise T. 3,  
TIT. II. c. 2, § 8, 9; Co. Litt. 53. a.)  
CAP. I.

Rights of  
tenant for  
life without  
impeach-  
ment of  
waste.

Estates for life are usually given 'without impeachment of waste.' And where this is the case, the tenant for life has a right to fell timber and convert it to his own use, and he is entitled to the property of all timber trees blown down. (1 Cruise T. 3, c. 2, § 51, 54.) But the Court of Chancery will restrain a tenant for life, without impeachment of waste, from cutting down timber serving for shelter or ornament to a mansion-house, as also timber not fit to be felled (1 Cruise T. 3, c. 2, § 61; Co. Litt. 220. a. n. [1]); which is commonly called equitable waste, because it is deemed improper and restrainable in equity, though permitted at law.

Rights of  
tenant for  
years.

The prohibitions against waste apply with even greater force to tenants for years. But where the clause 'without impeachment of waste' is inserted in a lease for years, it will have the same effect as when inserted in the conveyance of an estate for life. (1 Cruise T. 8, c. 2, § 12.)

2. Waste in  
buildings.

2. Waste may be done in buildings by pulling them down, or by suffering them to be uncovered, whereby the timbers become rotten. (1 Cruise T. 3, c. 2, § 11; Co. Litt. 53. a.)

If glass windows, though put in by the tenant himself, are broken or carried away, it is waste. So it is of wainscot benches, doors, floors, furnaces, and the like, annexed or fixed to the house either by the reversioner or the tenant. (1 Cruise T. 3, c. 2, § 13; 2 Bl. Com. 181; Co. Litt. 53. a.)

PART II.  
TIT. II.  
CAP. I.

3. A tenant for life or years cannot dig for gravel, lime, clay, brick-earth, stone, &c., where there are no pits open, except for the reparation of buildings or manuring of the land. A tenant for life or years may work open mines, but may not dig for any new mine. (1 Cruise T. 3, c. 2, § 14, 16; 2 Bl. Com. 282; Co. Litt. 53. b., 54. b.)

3. Waste as regards mines and pits.

4. If a tenant converts one kind of land into another, or makes alterations in the premises, though they greatly enhance the value of it, it is waste, because he has the use, and not the dominion; and the owner has a right to have the old features and associations of the property unaltered. So that an action may be maintained even for inclosing and cultivating waste land, or pulling down old buildings and substituting new ones of greater value. (Add. Torts, 120-1; Sm. Law of Prop. 1040, 1042; Coote's Landl. and Ten. 232-3.)

4. Altering the property.

5. The destruction of heirlooms is waste. (1 Cruise T. 3, c. 2, § 20.)

5. Destruction of heirlooms.

PART II.  
TIT. II.  
CAP. I.

6. Waste  
as regards  
living crea-  
tures.

Who are  
liable for  
waste.

Inspection  
of premises  
by lessor.

6. Waste may also be committed in ponds, dove-houses, warrens, parks, and the like, by so reducing the number of creatures therein that there will not be sufficient for the reversioner. (2 Bl. Com. 281; Co. Litt. 53. a.)

Tenants in fee or in tail may commit every kind of waste.

Tenants for life are punishable for waste, whether voluntary or permissive, unless their estates are made without impeachment of waste.

A tenant for years is liable for commissive waste, unless his interest is created without impeachment for waste; and he is bound to take reasonable care of the property; but a tenant at will or from year to year is not liable for permissive waste. (Add. Torts, 119; Sm. Law of Prop. 1042-3.)

A tenant for life or years is liable for commissive waste by a stranger. (Add. Torts, 127.)

A lessor has a right of inspecting the premises, to see if there is waste; and if the lessee prevents the inspection, he may be made to pay substantial damages, even though no waste may have been done. (Add. Torts, 128, 138.)

Ecclesiastical persons, being considered PART II.  
TIT. II.  
CAP. I. in most respects as tenants for life of the lands which they hold jure ecclesiæ, are disabled from committing any kind of waste. Waste by ecclesiastical persons.  
(1 Cruise T. 3, c. 2, § 71.)

Every copyholder may, of common right, as Waste by the lord or tenants of a manor. incident to the grant, take housebote, hedgebote, and ploughbote upon his copyhold; and the lord must leave sufficient for that and the reparation of the houses. But a copyholder cannot commit any kind of waste, unless there is a particular custom to warrant it; for, by the general custom of most manors, timber is the property of the lord. And a copyholder for life is punishable for permissive waste. (1 Cruise T. 10, c. 3, § 3, 7, 15.)

### V. *Of Subtraction.*

Subtraction is the withdrawal of, or the neglect to perform, any suit, duty, custom, or service, such as the oath of fealty, suit of court, rent, or other service due to the lord of the fee. For this, the remedy is, distress by way of pledge to enforce performance. (3 Ste. Com. 498-500.)

### VI. *Of Disturbance.*

Disturbance is usually a wrong done by Disturbance



PART II. hindering the owner of a hereditament in the  
 TIT. II. regular and lawful enjoyment of it, such as—  
 CAP. I. ———

of franchise, 1. The disturbance of franchise, for which a  
 specific action on the case will lie. 2. The  
 common, disturbance of common, by putting on the  
 cattle of a stranger, or by putting on creatures  
 which are not commonable, or more than the  
 proper number of creatures, or by destroying  
 the common, or ploughing up the soil, erecting  
 fences, driving out the cattle, &c.; for which  
 a special action on the case for damages will  
 lie, and in some instances a distress or an  
 right of way, action of trespass. 3. The disturbance of a  
 right of way; for which an action on the case  
 tenants, for damages will lie. 4. The disturbance  
 of tenants, by the driving them away from  
 the estate; for which a landlord has a special  
 action on the case for damages. 5. The  
 and patron- disturbance of patronage, which is an ob-  
 age. struction of a patron in presenting to a  
 benefice, the remedy for which was by an  
 action quare impedit. That action is now  
 abolished, and in lieu of it an action may be  
 commenced by an ordinary writ of summons,  
 on which a notice may be indorsed that the  
 plaintiff intends to declare in quare impedit.  
 (3 Ste. Com. 501-6.)

## CHAPTER II.

## OF INJURIES TO PERSONAL PROPERTY.

THE rights of personal property in possession are liable to two species of injury: the deprivation of the possession; and the abuse or damage of the chattels, while the possession continues in the legal owner. The deprivation of the possession is also divisible into two branches: the unjust taking them away, and the unjust detaining them, though the original taking away might be lawful. (3 Bl. Com. 144; Broom Com. 776.)

PART II.  
TIT. II.  
CAP. II.

Deprivation  
of possession, and  
damage.

Unjust tak-  
ing or de-  
tainer.

There are two descriptions of redress for the unjust taking. The first is the restitution of the specific chattels taken, with the payment of damages for the loss or injury occasioned by the temporary deprivation of the possession. The second is the giving a pecuniary equivalent in the shape of damages for the permanent loss of the articles taken. (See 2 Bl. Com. 145.)

Redress for  
unjust tak-  
ing.

It may here be observed that if a person has adopted a particular mark in trade or

Trade  
marks.

PART II. business, to denote that the goods were made  
TIT. II. by him, and the mark has become understood  
CAP. II. — in the trade, and his right is infringed by  
the use of a mark by another person, either  
precisely the same or so similar that the pub-  
lic in general would be misled, he is entitled  
to an action for the deceit, even without  
showing any specific damage. (Add. Torts,  
649-50; Tudor's Ca. on M. L. 487-500.)

**PART III.**

**OF PRIVATE RIGHTS AND WRONGS CONCERNING  
CERTAIN RELATIONS OF LIFE.**

## TITLE I.

## DOMESTIC RELATIONS OF LIFE.

## CHAPTER I.

## HUSBAND AND WIFE.

## SECTION I.

*Of the Marriage Contract.*

- PART III. I. THERE are certain grounds on which mar-  
 TIT. I. riages may be set aside as null and void.  
 CAP. I.  
 SEC. I.

Marriages  
invalid on  
account of  
1. Impotence.

Thus: 1. Impotency, at the time of the  
marriage, is a ground for avoiding it. (Macq.  
341-2.)

2. Bigamy. 2. A second marriage is void, if the hus-  
band had another wife, or the wife had  
another husband, living at the time of such  
second marriage. (Macq. 343-4.)
3. Want of age. 3. If either party is under the age of  
seven years, the marriage is void. If the  
husband is above seven and under fourteen  
years of age, or the wife is above seven and  
under twelve, the marriage is not absolutely

void ; but the husband, on attaining the age of fourteen, or the wife on attaining the age of twelve, may disagree to and avoid it ; but if at that age they agree to continue together, they need not be married again. No promise to marry, made by a person under the age of twenty-one years, is binding upon such person, though it is upon the opposite party, if of age. (Macph. 168 ; Add. Cont. 937.)

PART III.  
TIT. I.  
CAP. I.  
SEC. I.

4. The marriage of an idiot or lunatic, 4 Lunacy. except during a lucid interval, is void. (Macq. 342.)

5. Marriages within the prohibited degrees of consanguinity or affinity are also void. (Macq. 327.) Thus, marriages between persons who are lineally related to each other are void ; and so also are marriages between persons collaterally related to each other in the second or third degree, according to the mode of computation in the civil law, whether they be related by consanguinity or by affinity. Thus, a man cannot marry either his sister or his wife's sister : for both are related to him in the second degree ; the one by consanguinity, the other by affinity. Nor can he marry his sister's daughter, nor wife's sister's daughter : for both are related to him in the third degree. But he may

5. Consanguinity or affinity.

PART III. marry his first cousin : for she is only related  
 TIT. I. to him in the fourth degree. The relations  
 CAP. I. by consanguinity of the wife are always  
 SEC. I. related by affinity to the husband ; and in  
 like manner the relations by consanguinity  
 of the husband are always related to the  
 wife. But the relations by consanguinity of  
 the husband are not, as such, related, even  
 by affinity, to the relations by consanguinity  
 of the wife ; and hence two brothers may  
 marry two sisters, or father and son a mother  
 and daughter. Nor is the husband, as such,  
 related, even by affinity, to those who are  
 only related to the wife by affinity ; and  
 therefore a man may marry his wife's  
 brother's wife. (2 Ste. Com. 255-6.)

The prohibitions as to collaterals extend  
 even to the half-blood, and to illegitimate  
 children. (Id. 256.)

6. Violation  
 of prescribed  
 regulations.

6. Marriages are sometimes void on ac-  
 count of the violation of some of the regu-  
 lations prescribed by law for the due cele-  
 bration of marriage.

11. Modes of  
 proceeding  
 towards cele-  
 bration of  
 marriage.

II. There are four modes of proceeding  
 towards the celebration of marriage.

1. By banns.

1. By a publication of banns, upon three  
 successive Sundays, in the church or chapel  
 where the marriage is to be solemnised,

according to the rites of the Church of Eng- PART III.  
TIT. I.  
CAP. I.  
SEC. I.  
land.

2. By a licence from the ecclesiastical authority, that is, a special licence from the Archbishop of Canterbury, or a common licence from the ordinary of the place or his surrogate. 2. By ecclesiastical licence. In the case of a licence, one of the parties must have had his or her usual place of abode, for fifteen days immediately preceding, in the parish where the church or chapel in which the marriage is to be solemnised is situate, and, whether by banns or by licence, the marriage must take place between eight and twelve o'clock in the forenoon, except in the case of a special licence, and be solemnised by a person in holy orders, and before not less than two other credible witnesses. If the intended husband or wife, not being a widower or widow, is under the age of twenty-one, and his or her parent or guardian openly signifies disapproval at the time the banns are published, the publication is void. And, on obtaining a licence, one of the parties must make oath as to his or her belief that there is no lawful impediment, and that one of them has had his or her usual place of abode, for fifteen days immediately preceding, within the parish or chapelry



**PART III.** within which the marriage is to be solemnised; and, where one of the parties, not being a widower or widow, is under the age of twenty-one years, that the consent of the father, or, if the father is dead, of the guardian, or, if there is no guardian, then of the mother, being unmarried, or, if no mother unmarried, then of the guardian appointed by the Court of Chancery, has been had.

**TIT. I.**  
**CAP. I.**  
**SEC. I.**

3. By the  
superinten-  
dent-regis-  
trar's certifi-  
cate without  
licence.

3. By the superintendent-registrar's certificate, without licence, after a notice given to him of the intention to marry in a specified place; which notice is entered in a book, called 'the marriage notice book,' and is put up in his office during twenty-one successive days after being so entered.

A person whose consent would be required to a marriage by ecclesiastical licence may forbid the issue of the certificate, by writing 'forbidden' opposite the entry of the notice; or a caveat may be entered by any person against the grant of the certificate or licence.

On the issuing of the certificate, the marriage may be solemnised, before a registrar and two or more credible witnesses, in a building registered as a place for the solemnisation of marriage, or at the office of the superintendent-registrar, or according to the

rites of the Church of England in a church or chapel within the superintendent-registrar's district, or according to the usages of the Quakers or Jews, if both parties are of those persuasions respectively.

PART III.  
TIT. I.  
CAP. I.  
SEC. I.

4. By the superintendent-registrar's certificate, with licence, which is issued after a notice similar in most respects to the notice in the previous case. But the notice in this case need not be put up in the office of the superintendent-registrar; and the certificate may be obtained after the expiration of one whole day, instead of twenty-one days next after the entry of the notice.

4. By the  
superinten-  
dent-regis-  
trar's certi-  
cate, with  
licence.

The marriage in this case may be solemnised according to any of the four methods before stated, except that the superintendent-registrar cannot grant a licence for marriage in a church or chapel of the Church of England.

Such are a few of the numerous points connected with proceedings towards the celebration of marriage. It must suffice to add that the non-observance of some of the regulations subjects to a penalty, the infringement of others is punishable as a felony, and the violation of others renders the marriage void. (See 2 Ste. Com. 257-68,

PART III. to which most valuable work the reader is  
 TIT. I. referred for further information on this  
 CAP. I. subject.)  
 SEC. I.

III. Decree  
 declaratory  
 of validity of  
 marriage,  
 legitimacy,  
 &c.

III. The Court for Divorce and Matrimonial Causes may, on petition of a natural-born subject of the Queen, domiciled in England or Ireland, or claiming any real or personal estate situate in England, make a decree declaratory of the validity or invalidity of the marriage of such person, or of his father and mother, or of his grandfather and grandmother, or of his legitimacy or illegitimacy, or of his right to be deemed a natural-born subject of the Queen. (21 & 22 Vic. c. 93, s. 1, 2.)

IV. Suits for  
 jactitation of  
 marriage.

IV. When marriages were allowed to be celebrated in a more clandestine manner, suits for jactitation of marriage, that is, for boasting of being married to a person, contrary to the fact, were of frequent occurrence; but they are now unheard of, though they may still be instituted. (Macq. Div. 321-2.)

## SECTION II.

*Of the Consequences of the Marriage, as connected with Common Law.*

Married women cannot bind themselves by any mercantile contract. To this, however, there are these exceptions: that a married woman may be a sole trader in the city of London; and that if a woman's husband becomes civilly dead, as when he is under sentence of transportation, or if she is judicially separated and continues to live apart, she may carry on trade for her own support; and in these cases she may become a bankrupt. (Sm. Merc. Law, 18; Sm. Cont. 285; Add. Cont. 770.)

PART III.  
TIT. I.  
CAP. I.  
SEC. II.

Mercantile  
contracts by  
married  
women.

Unless there is evidence to the contrary, it is presumed that a wife who resides with her husband is authorised to bind him by contracting for necessities; but that a wife who is living separately from her husband has no such authority, unless the separation was by consent, or by her husband's compulsion, or occasioned by his misconduct, and he does not make adequate provision for her support. (Sm. Cont. 415; Add. Cont. 767-70; Bright's Husb. & Wife, 6-12.)

Wife's power  
to bind her  
husband by  
contract  
suitable to  
the fortune  
and degree of  
the husband.

Although a married woman, residing with

PART III. her husband, has an implied authority from  
 TIT. I. her husband to order food, clothing, furni-  
 CAP. I. ture, and other necessary articles, yet, if her  
 SEC. II. orders are of such a description as, under  
 the circumstances, naturally to raise a doubt  
 whether her husband would have authorised  
 her to give them, the tradesman is bound to  
 satisfy himself that they were so authorised.  
 (See Add. Cont. 767-8.)

Order of pro-  
 tection of  
 property of  
 wife who is  
 deserted.

A wife deserted by her husband may apply to a police magistrate, to justices in petty sessions, or to the Divorce Court, for an order to protect any money or property which she may acquire by her own lawful industry, or of which she may become possessed, after such desertion, against her husband or his creditors, or any person claiming under him; and such magistrate or justices or Court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and such earnings and property will belong to the wife

as if she were a feme sole. And in every case of a judicial separation, the wife will, from the date of the sentence and whilst the separation continues, be considered as a feme sole with respect to property of every description which she may acquire or which may come to or devolve upon her ; and such property may be disposed of by her in all respects as a feme sole, and on her decease, the same, in case she dies intestate, will go as the same would have gone if her husband had been then dead ; and if the wife again cohabits with her husband, all such property as she may be entitled to when such cohabitation takes place will be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate. (20 & 21 Vic. c. 85, s. 21, 25.) And as regards contracts, wrongs, and suits, the wife, whilst so separated, will be considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding. (s. 26.)

The husband takes a freehold interest, during the joint lives of himself and his wife, in land belonging to her in fee simple, in tail, or for life. (Sm. Law of Prop. 982.) And if he has had issue by her capable of

PART III.  
TIT. I.  
CAP. I.  
SEC. II.

Wife judicially separated to be considered a feme sole as regards her property.

Husband's interest in the wife's real estate.

**PART III.** inheriting the property, he is entitled, on  
**TIT. I.** her death, to an estate by the curtesy, that  
**CAP. I.** is, an estate for life in lands or tenements of  
**SEC. II.** which she was tenant in fee or in tail in  
 possession. (See Sm. Law of Prop. 173.)

Wife's  
interest in  
the husband's  
real estate.

On the other hand, the wife becomes entitled, on the husband's decease, to an estate in dower, that is, an estate for life in lands or tenements of which he dies entitled for any estate of inheritance in possession, unless the title to dower be prevented, barred, or lost. And she is also entitled to a third of his personality if he dies intestate leaving issue, or a moiety if he dies intestate without issue. (See Sm. Law of Prop. 178-198, 467.)

Husband's  
interest in  
the wife's  
chattels real.

The wife's chattels real vest in the husband sub modo. Thus, he is possessed of his wife's term for years, and entitled to the rents and profits; and he may alien it, or it will belong to him absolutely if he survives the wife. (See Sm. Law of Prop. part iv. tit. i. c. 3, s. 3.)

Husband's  
interest in  
wife's chat-  
tels personal.

As to chattels personal in possession which the wife has in her own right, as ready money, jewels, household goods, and the like, the husband has an immediate and absolute property therein by the marriage, which never can again revest in the wife or

her representatives. But chattels personal, PART III.  
TIT. I.  
CAP. I.  
SEC. II. en autre droit, as executrix or administratrix, &c., do not belong to the husband, though he survive, but go to the administrator de bonis non of the wife. (2 Bl. Com. 435 ; Co. Litt. 351. b ; 1 Bright's Husb. & Wife, 34, 39.)

As to the wife's chattels personal or choses in action, which comprise debts, legacies, residuary personal estate, money in the funds, &c., these the husband may have, if he reduces them into possession. They then become absolutely and entirely his own, and go to his executors and administrators, or as he bequeaths them by will, and will not revert in the wife. But if he dies before her, and before he has released them or reduced them into possession, so that at his death they still continue choses in action, they will survive to the wife, whether against the personal representatives of the husband, or against his assignees in bankruptcy, or against his assignees for valuable consideration. If he survives her, he will not have them by survivorship, as he would have a chattel real, except in the case of arrears of rent due to the wife before her coverture, which in case of her death are given to the husband by the stat. 32 Hen. VIII. c. 37 ; but



PART III. he will still be entitled to the chose in ac-  
TIT. I. tion as her administrator, and may in that  
CAP. I. capacity recover such things in action as  
SEC. II. became due to her before or during the  
coverture. (2 Bl. Com. 434-5; Co. Litt.  
351. b.; Add. Cont. 760-1; Sm. Cont. 280-1.)  
On taking out administration to her estate,  
he will become entitled, as her administrator,  
to all her personal estate which was out-  
standing and unrecovered at her death. And  
if he does not take out administration to  
her estate, but some other person does, the  
husband will be entitled to any surplus  
which may remain after paying the wife's  
debts. If the husband dies before he or  
some other person has administered to her  
estate, his personal representatives may take  
out letters of administration to her estate,  
and recover all her property in action and  
unrecovered at her death, even though such  
property was reversionary at her death, and  
in fact did not cease to be so until after the  
death of the husband; as where he died in  
the lifetime of a prior taker of the property.  
But the personal representatives of the hus-  
band are trustees for the persons beneficially  
entitled to his general personal estate, under  
his will, or under the statutes of distribution,

or under the statutes relating to bankruptcy, PART III.  
TIT. I.  
CAP. I.  
SEC. II.  
or otherwise, as the case may be, as to any surplus which may remain after paying the wife's debts. (See 1 Bright's Husb. & Wife, 36, 41-2, 72, 77-87; 1 Wms. on Exors. 339, 742; *Drew v. Long*, 22 L. J. 717, v.c.k.)

Upon the marriage, the husband becomes Wife's contracts before marriage. liable to the wife's ante-nuptial contracts. But on her death, his liability ceases, except as her administrator, unless judgment has been recovered against husband and wife in her lifetime. If he survives her, and takes out administration, he is liable to be sued on them, as his wife's administrator. If she survives him, her liability revives, in case nothing has been done to put an end to the contracts, during the continuance of the marriage. (Sm. Cont. 280-1; Add. Cont. 764; 2 Bright, 1-3.)

A husband may sue on a contract made Right of suing on contracts made with married women. with his wife on good consideration. If he die without suing, the right to sue upon it will survive to the wife. (Sm. Cont. 285; Add. Cont. 761.)

The custody of the wife's person belongs to Custody and correction of the wife. the husband. He has no right to chastise her; but he may restrain her liberty, in case of gross misbehaviour. (2 Ste. Com. 273.)

## SECTION III.

*Of Divorce, Annuling Marriage, and Separation.*

PART III. Before the new Divorce Act, there were  
 TIT. I. two kinds of divorce: first, a divorce by the  
 CAP. I. Ecclesiastical Court, a vinculo matrimonii,  
 SEC. III.

whereby the marriage was declared null, as  
 having been absolutely unlawful ab initio,  
 and the issue, if any, became bastardised,  
 and the parties were enabled to contract  
 another marriage; secondly, a divorce a  
 mensa et thoro, whereby they were merely  
 separated, without annulling the marriage.

Divorce a vinculo matrimonii could not  
 be obtained from the Ecclesiastical Court  
 for any post-nuptial cause, but was often  
 granted, on the ground of adultery, by a pri-  
 vate Act of Parliament. (2 Ste. Com. 285-7.)

By the st. 20 & 21 V. c. 85, however, the  
 jurisdiction of the Ecclesiastical Courts was  
 transferred to the new Court for Divorce and  
 Matrimonial Causes.

This Court may, on the petition of either  
 husband or wife, decree a judicial separation,  
 in lieu, and having the effect, of the divorce  
 a mensa et thoro. (s. 7, 16.) Such judicial

separation may be decreed on the ground of adultery, or cruelty, or desertion without cause for two years and upwards. The new Court may also grant a divorce or dissolution of marriage, on the petition of the husband, upon the ground of the post-nuptial adultery of the wife; or, upon the petition of the wife, upon the ground that the husband, since the marriage, has been guilty of incestuous adultery, or bigamy with adultery, or rape, or unnatural crime, or adultery coupled with certain kinds of cruelty, or with desertion, without reasonable excuse, for two years or upwards. (s. 27.) But the Court may not grant a divorce if the petitioner has been accessory to or connived at the adultery, or has condoned it.

PART III.  
TIT. I.  
CAP. I.  
SEC. III.

Divorce.

And the Court will not be bound to grant a divorce, if the petitioner has, during the marriage, been guilty of adultery, or if the petitioner has been guilty of unreasonable delay in presenting or prosecuting the petition, or of cruelty towards the other party, or of having deserted or wilfully separated from the other party, before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery. (s. 31.)

PART III. An order may be made for alimony to the  
 TIT. I. wife, either on a decree for judicial separation  
 CAP. I. on the wife's petition, or on a decree for dis-  
 SEC. III. solution of the marriage. (s. 17, 32.) Alimony

Alimony.

is an allowance made to the wife when cohabitation has ceased. It is either pendente lite or permanent. (Macq. 135, 141.)

Appeal.

On a decree for the dissolution of the marriage, a dissatisfied party may appeal to the House of Lords; but in case of no appeal, or in case of an appeal having been dismissed, or if the marriage is dissolved, either party may marry again. (s. 57.—See on this subject Macq. Law of Div. passim.)

Marriage  
after a  
Divorce.

Annuling a  
marriage.

Marriages may be annulled by the Court for Divorce and Matrimonial Causes, where they have taken place after a divorce obtained by fraud or collusion, or from a court not having competent jurisdiction; or where the parties are within the prohibited degrees of consanguinity or affinity, or both have acted in wilful disobedience of certain of the enactments as to the marriage ceremony; or where there was, in either of the parties at the time of the marriage, corporal incapacity, idiocy, or lunacy; or where the marriage was the result of force or fear, not followed by voluntary cohabitation. (Macq. Div. 323-44.)

The husband and wife may agree to live separately ; and the Courts of Law and Equity have recognised the validity of deeds or articles of separation executed for the purpose of carrying such agreement into effect, where the husband and wife have actually come to a resolution of present separation.

PART III.  
TIT. I.  
CAP. I.  
SEC. III.

Separation  
by consent.

The husband usually covenants with trustees appointed on behalf of the wife, for her maintenance ; and the trustees covenant to indemnify the husband against her debts ; and each party covenants not to molest the other or sue for the restitution of conjugal rights. But an agreement providing for the contingency of a future separation, or a covenant for separation, whether immediate or future, is void. (2 Ste. Com. 284-5 ; Sm. Law of Prop. 1008.)

As a deed of separation cannot dissolve the marriage, it does not relieve the wife from any of the ordinary disabilities of coverture. (Story's Eq. Jur. § 1428.) And reconciliation puts an end to a deed of separation, as it must not be permitted to parties to make agreements for themselves to hold good whenever they choose to live separate. (2 Spence's Eq. Jur. 532.)

## CHAPTER II.

## PARENT AND CHILD.

PART III. A LEGITIMATE child is one between whose  
 TIT. I.  
 CAP. II. parents the relation of marriage subsisted at  
 the time of conception or of birth, or at  
 some intervening period. Whether the hus-  
 band is the real parent of a child born to his  
 wife during the marriage or after the death  
 of the husband, may, however, be open to  
 controversy. But he is presumed to be the  
 parent unless he was absent for not less than  
 nine calendar months or forty weeks before  
 the birth, or was impotent, or could not have  
 had sexual intercourse with the wife during  
 that period. (See 2 Ste. Com. 291-2 ; Steer's  
 Par. Law, 568 ; Co. Litt. b. n. 1, 2.)

Who are  
 legitimate  
 children.

Custody and  
 education of  
 children.

In general, parents are intrusted with the  
 custody and education of their children, on  
 the natural presumption that the children  
 will be properly treated, and that due care  
 will be taken of them, in regard to learning,  
 morals, and religion. But whenever this  
 presumption is negatived by the actual state

of the case, and a father is guilty of gross ill-treatment of his infant child, or is living in gross immorality or avowed impiety, or otherwise acts in a manner injurious to the morals or interests of his children, the Court of Chancery will deprive him of the custody of his children, and appoint a suitable person to act as guardian, if the children have property. (Sm. Manual, 389-90.)

PART III.  
TIT. I.  
CAP. II.

Parents are legally bound to provide their legitimate children, of whatever age, with necessaries, when the children are in poverty, and unable, through infancy, disease, or accident, to support themselves. (2 Ste. Com. 296-7.)

Maintenance  
of legitimate  
children.

A father is entitled to the custody and control of his children until the age of twenty-one years; and he may correct them, while under age, in a reasonable manner; and may delegate his authority to their tutor or schoolmaster. (2 Ste. Com. 299-301.)

The father's  
power over  
his children.

The mother has no legal power over her child in the father's lifetime, at least as against the father, unless delivered into her custody by the order of the Court of Chancery or the Divorce Court. But after the father's death, she is entitled to the custody of the

The mother's  
power  
over her  
children.



PART III. child during minority. (2 Ste. Com. 301;  
TIT. I.  
CAP. II. Macq. Div. 174.)

Maintenance  
of parents.

The children of poor persons not able to support themselves, must, if of sufficient ability, maintain their parents. (2 Ste. Com. 302.)

Actions by  
parents.

A parent cannot bring an action for injury done to his child, though the parent may have been put to expenses in getting the child cured, unless the child is old enough to render him some sort of service, however slight, and can be treated in law as his servant! (Add. Torts, 697; 3 Ste. Com. 532.)

Indeed, a parent has no remedy for the seduction of his daughter, even though he may have been put to great expenses in consequence of it, unless the child was living with him at the time, and, by reason of her pregnancy and illness, he was deprived of her services; in which case, however slight those services may have been, and without proof of any being rendered, an action for damages is maintainable by the parent against the seducer, if the pregnancy was caused by him, and if the parent was not the indirect cause of the seduction, by introducing her to profligate acquaintances or encouraging improper intimacies. (Add.

Torts, 697-700; Broom Com. 75, 77-8; PART III.  
TIT. I.  
CAP. II.  
3 Ste. Com. 532; Roscoe on Evid. 589-90.)

In estimating, however, the damages to be given for a daughter's seduction, the jury may give the father damages for the distress and anxiety of mind which he has sustained. (Add. Torts, 702; Mayne, 284.)

The mother of an illegitimate child is entitled to its custody, and is bound to maintain it, while she remains single or a widow, or until the child attains the age of sixteen, or gains a settlement in its own right, or, being a female, is married; and if the mother marries, her husband then becomes subject to the same obligation; but this ceases on the mother's death. If, however, the mother, while single or a widow, is not of sufficient ability, she can compel the father to supply a fund for its maintenance, and she may take steps for that purpose even before the child is born. (2 Ste. Com. 302-4; Steer's Parish Law, 559, 560, 569.)

Maintenance  
of illegiti-  
mate child-  
ren.

## CHAPTER III.

## GUARDIAN AND WARD.

PART III. THERE are several species of guardianship :

TIT. I.  
CAP. III.

—  
Different  
species of  
guardian-  
ship.

1. By nature. 1. Guardianship by nature, which is a guardianship of the person only, belonging to the ancestor, in respect to his heir apparent or heiress presumptive, until the age of twenty-one years.
2. For nurture. 2. Guardianship for nurture, which is a guardianship of the person only, belonging to the father, or, at his decease, to the mother, and extends to all the children, until the age of fourteen years, if not to the age of twenty-one.
3. In socage. 3. Guardianship in socage, which extends both to the person and the estate, where the legal estate in hereditaments of socage tenure descends upon a minor.

If the land descends to the heir *ex parte paterna* or *ex parte materna*, the guardianship of the person belongs to the next of blood to whom the inheritance cannot descend.

But if the infant derives land by descent PART III.  
TIT. I.  
CAP. III.  
both ex parte paterna and ex parte materna, the next of kin on either side first seizing the infant is entitled to the custody of his person. This guardianship continues until the minor is fourteen years of age.

4. Guardianship by statute, which is 4. By statute.  
created by an appointment by a father, made by deed or will, of a guardian of the persons and estates of his legitimate children, until the age of twenty-one years, or for any less time. Such an appointment is effectual against all persons claiming as guardians in socage or otherwise.

A mother cannot appoint a guardian. Nor can a father make a valid appointment of a guardian to his natural child. If, however, he does nominate a person to be guardian, the Court of Chancery will generally appoint such person to that office.

5. Guardianship by election, which is 5. By election.  
nearly, if not quite obsolete.

6. Guardianship, by appointment of the 6. By appointment of the Court of Chancery.  
Court of Chancery, of the person and estate of an infant, whether legitimate or illegitimate, who has property, or of the person only of an infant who, by reason of being a party to proceedings in Chancery, has become

**PART III.** a ward of the Court. Such a guardian may  
**TIT. I.** be appointed either where there is no other  
**CAP. III.** guardian, or where it appears to the Court to  
 — be expedient that a guardian of any kind  
 should be superseded.

**7. Ad litem.** 7. Guardianship ad litem, which occurs  
 where a person, usually the father or ordinary  
 guardian, is appointed by a court of justice  
 to prosecute or defend for an infant in any  
 suit to which he is a party.

**8. By custom.** 8. Guardianship by custom in the case of  
 copyholds and particular cities and boroughs.  
 (2 Ste. Com. 314-23; Macph. 19, 20, 44-48,  
 53, 59, 60, 76, 80-1, 103, 105, 109, 110;  
 Sm. Law of Prop. 1011.)

**Obligation to** Every guardian, when the ward comes of  
**account.** age, is bound and compellable to account to  
**Liability.** him, and must answer for all losses by his  
 wilful default or negligence. The guardian  
 will be allowed his reasonable costs and  
 expenses, but may not make any profit out  
 of his ward's estate. (2 Ste. Com. 323;  
 Macph. 348, 350.)

**Full age.** Full age, in male or female, is twenty-one  
 years; and it is completed on the morning  
 of the day preceding the anniversary of a  
 person's birth; so that a person born on the  
 1st day of January, 1860, at any moment

before midnight, would be of age on the 31st of December, 1880, immediately after midnight of the 30th. (2 Ste. Com. 308 ; Macph. 447.)

All who are not of full age are legally designated as infants.

PART III.  
TIT. I.  
CAP. III.

Who are infants.

## TITLE II.

## RELATIONS OF LIFE IN RESPECT OF PROPERTY.

## CHAPTER I.

## NEIGHBOURING PROPRIETORS.

PART III. THERE are certain rights which the owner  
 TIT. II. of one neighbouring tenement has with  
 CAP. I. respect to another such tenement.

Rights of  
 neighbour-  
 ing proprie-  
 tors.

Profits à  
 prendre.

Those which are directly profitable are called profits à prendre; such as rights of common.

Easements.

Those which are mere rights of accommodation are termed easements. An easement may be defined to be a right and privilege, without profit, which the owner of one neighbouring tenement has with respect to another tenement, by reason of which the owner of such other tenement is obliged to suffer or not to do something on his own land, for the advantage of the owner of the former tenement who is entitled to such privilege. There are a great number of easements; such as rights of way, rights to receive air, light, and water. (Gale on

Easements, 5 &c. ; Add. Torts, 16, 17 ; PART III.  
TIT. II.  
CAP. I.  
Burton's Comp. § 1165.)

The property to which the privilege is annexed as a benefit, is termed the dominant tenement; and the property on which the burden or servitude is imposed is called the servient tenement. (Add. Torts, 17; Gale, 13.)

—  
Dominant  
and servient  
tenements.

Where there are distinct proprietors of the lands on opposite banks of a stream, each riparian proprietor is, *prima facie*, the proprietor of half of the land covered by the stream which is nearest his own bank, but has no property in the water. Every landowner, however, has a right, as an ordinary incident of property, to use the water of a natural stream flowing through or by his land, for any reasonable purpose not inconsistent with a similar right in the proprietors of the land above and below; as, for instance, to drink, to water his cattle, to turn his mill, &c. But he cannot seriously diminish the quantity, nor deteriorate the quality, nor alter the flow of the water, to the injury of another proprietor, otherwise than by such diminution, retardation, or acceleration, as may be the necessary result of a reasonable use; unless he has gained a title to an ease-

Running  
water.



PART III. ment, by grant or prescription, so to use the  
 TIT. II. water. (Add. Torts, 1, 2, 3, 4, 6, 77-8;  
 CAP. I. Broom Com. 764-5; Gale on Easements,  
 — 191-7, 238-9; Tudor's Real Prop. Ca.  
 118-9; Dixon's Law of Farm, 124-9, 132.)

Well-water. A person may sink a well in his own land, and get as much water as he pleases, for any purpose whatever, although he thereby drains the neighbouring springs and wells dry; and the adjoining proprietor has no other remedy than to sink deeper wells, and use appliances to get back the water. (Add. Torts, 5; Broom Com. 76-7; Gale on Easements, 242-62; Dixon's Law of Farm, 129.)

Servitude of  
 receiving  
 and dis-  
 charging  
 water.

If the owner or occupier of the lower lands obstructs the natural flow of the water through his lands, so as to cause the higher lands to be flooded, or if the owner or occupier of the higher lands causes the surface and drain water to flow on the lands below in a greater volume and in an unnatural form, he will be responsible in damages. (Add. Torts, 6.)

Passage for  
 waste water.

A person may, by deed or prescription, have a right of passage for waste water through an artificial drain or watercourse in another man's land, without having any interest in such land. (Add. Torts, 23; Gale, 54.)

On the sale of a house, without the adjoining land of the vendor, a free passage for necessary light and air across such adjoining land is impliedly granted. (Add. Torts, 37; Gale, 97, 103.)

PART III.  
TIT. II.  
CAP. I.

Light and  
air.

Neither a landlord nor a tenant can, without each other's consent, obstruct or darken windows existing at the time of the demise. (Add. Torts, 38; Gale, 100.)

The right to light and air is confined to windows existing at the time of the conveyance, grant, or demise, and does not extend to windows subsequently opened, where there were none before, or to new windows of a different size or position from the old ones, except as far as regards the space of the new windows which may have been occupied by the ancient aperture. (Add. Torts, 38, 48, 55; Broom Com. 760.)

If a new house is erected contiguous to another's ground, the latter may, at any time within twenty years, erect any kind of building, on purpose to blind the lights of that house; and no action will lie, even though it were done from mere malice. (Broom Com. 74; Gale on Easements, 282; Tudor's Real Prop. Ca. 123.)

Although a person grant a licence to open a

PART III. window, unless the grant is made by deed, he  
 TIT. II. may build a wall on his own land close to  
 CAP. I. the window, and thereby exclude the light  
 — and air from it. (Add. Torts, 24; Gale, 23.)

Rights of  
 owner of  
 surface and  
 subsoil.

The owner of the surface and the owner of the subsoil must not exercise their respective rights in such a way as to be inconsistent with the fair use and enjoyment of the rights of each other. The owner of the surface, therefore, is entitled to the support of the adjacent strata, sufficient to maintain the surface in its natural state, but not to such a degree of support as is necessary for buildings, unless he has acquired the right of support for them by grant or prescription. If, however, the owner of the subsoil excavates without leaving proper support, the owner of the surface has no right of action until some actual damage has been sustained by him; but he would have a right to an injunction in equity to prevent such improper excavation. (Add. Torts, 8, 9; Broom Com. 73, 79-81; Gale on Easements, 309-12.)

Support of  
 land and  
 buildings by  
 adjacent  
 land or ad-  
 joining  
 houses.

Everyone has a right to such a degree of lateral support to his own land from the land adjoining it, as will be sufficient to sustain his own land in its natural state, without being weighted with buildings. (Add. Torts,

7; Gale on Easements, 309-11, 314, 323; PART III.  
TIT. II.  
CAP. I. Tudor's Real Prop. Ca. 124.) And where houses built together require mutual support, the right to such support continues, notwithstanding alterations in the ownership of the houses by sale, mortgage, devise, &c. (Add. Torts, 35; Tudor's Real Prop. Ca. 126.) And it would seem that a person may not take away from the owner of a house or building the benefit of lateral support from the adjoining land or building, after having acquiesced in the enjoyment of that benefit for more than twenty years. (Add. Torts, 45; Gale on Easements, 325-32; Tudor's Real Prop. Ca. 125.) And see p. 59, *supra*.

There is a right of continuous support of the upper stories of a house from the lower, where they are vested in different owners. (Add. Torts, 35-6; Gale, 98, 322.)

In the absence of evidence to the contrary, waste land on the side of a river or public highway is deemed to belong to the owner of the adjoining inclosed land, and not to the lord of the manor, unless the waste land communicates with open commons or larger portions of land. (Add. Torts, 153; Woolrych on Ways, 5, 6; Sm. Law of Prop. 113.)

PART III. The ownership of a tree standing in a  
 TIT. II. hedge follows the ownership of the hedge.  
 CAP. I.

Trees. Where all the roots of a tree are in a person's land, and the branches hang chiefly or entirely over another person's land, it belongs to the person in whose land the roots are. But where the trunk stands on one person's land, and the roots are in another person's land, it belongs to the person on whose land the trunk stands. (Add. Torts, 154; Dixon's Law of the Farm, 81-2.)

Hedges and  
 ditches. In general, a boundary hedge belongs to the owner who has been in the habit of cutting and repairing it. But, in some cases, the owners of the adjoining lands are tenants in common of the hedge; and in such cases each has a right to clip the hedge, but not to destroy it. (Add. Torts, 156; Dixon, 96.)

A person may make a ditch, and widen it as much as he pleases, so far as he can do so by cutting into his own land. No man making or widening a ditch may cut into his neighbour's soil, but he may and usually does cut to the very extremity of his own land; and he is bound to throw the soil which he excavates on his own land; and he often plants a hedge on the top of the soil so thrown up. And hence, where adjacent lands of two

distinct proprietors are divided by a hedge and a ditch, the legal presumption is, that both the hedge and the ditch belong to the owner of the field in which the ditch is not situate. (Add. Torts, 155 ; Dixon's Law of the Farm, 92.)

PART III.  
TIT. II.  
CAP. I.

In general, at law, an easement can only be granted, in a binding and irrevocable manner, by a deed. (Gale, 23 ; Dixon, 55.)

Express  
grant of an  
easement.

A grant of a right will not be presumed from long-continued uninterrupted enjoyment, unless the enjoyment has been open and notorious, and exercised as a matter of right, and is not capable of being satisfactorily accounted for without presuming a grant. (Add. Torts, 27.)

Presumption  
of a grant.

If, by the act of the owner, one part of his land becomes dependent upon another for water, light, or air, these easements pass to the grantees of the land to which they are annexed, together with the land. And where a person buys one of two or more adjoining houses belonging to the same owner, the purchaser becomes entitled to the benefit, as an easement, of all the drains from it, and is subject, as a servitude, to all the drains necessary for the adjoining house. (Add. Torts, 29 ; Gale on Easements, 81, 85.)

Implied  
grants of an  
easement.

PART III.  
TIT. II.  
CAP. I.

Repairs in-  
cident to  
easements.

A grantee of a right of way or of an artificial drain or watercourse through the grantor's land, or the use of a pump in the grantor's land, is bound to repair the way, drain, watercourse, or pump, if he desires to have it kept in order for his own use, or if repairs are necessary to prevent it becoming an annoyance to the owner of the servient tenement. And for that purpose he may enter upon the grantor's land, unless the grantor himself has undertaken to repair it. (Add. Torts, 30-1, 61, 75 ; Gale on Easements, 424, 441 ; Tudor's Real Prop. Ca. 127.)

Transfer of  
rights.

A right which is accessorial to the enjoyment of a house or land passes to the successive assigns of the house or land, by a grant of the house or land. (Add. Torts, 26 ; Gale on Easements, 75.)

Cesser of  
easements.

An easement ceases, when the purpose for which it was granted can no longer be accomplished, or when the thing to which it was accessorial ceases, or when the ownership of the dominant and servient tenements becomes vested in the same person, and he has an equal estate in fee-simple in both tenements, or when the right is expressly released or abandoned. (Add. Torts, 53, 57, 59, 470 et seq ; Gale, 470 et seq.)

## CHAPTER II.

## LANDLORDS AND TENANTS.

LANDLORDS who have the immediate rever- PART III.  
 sion of premises in respect of which rent is TIT. II.  
 due to them, may enter upon the premises, CAP. II.  
 in person or by deputy, and seize and sell Distress, by  
 the personal property therein, to raise money whom made.  
 for the payment of the rent in arrear.  
 (Add. Torts, 345; Woodfall's Landlord and  
 Tenant, 355; Tudor's Real Prop. Ca. 188,  
 191.)

The rent does not become due till the last When rent is  
 minute of the day on which it is payable; due.  
 and a distress can only be made in the day- When a dis-  
 time, that is, between sunrise and sunset; tress may be  
 and hence, practically, a distress cannot be made.  
 made until the day after it is payable.  
 (Woodfall, 376; Tudor's Real Prop. Ca.  
 190-1; Add. Torts, 352.)

A distress may be made even after the  
 determination of the lease, if within six  
 months, and during the continuance of the



PART III. landlord's interest and the tenant's posses-  
 TIT. II. sion. (Add. Torts, 349; Woodfall, 386;  
 CAP. II. — Tudor's Real Prop. Ca. 191.)

How made. A gate or outer door may not be forced open to make a distress; nor can a distress be made upon land not included in the demise, and in respect of which the rent is not payable, except upon land to which the goods have been fraudulently removed, and except in the case of cattle depasturing upon a common appendant or appurtenant. (Add. Torts, 352-3; Woodfall, 369, 378; Tudor's Real Prop. Ca. 190.)

In order to make a distress, seizure is necessary; but to constitute a seizure, in contemplation of law, it is sufficient to enter upon the demised premises, and announce to the tenant, or his servants, or the persons in actual occupation of the premises, an intention to distrain. (Add. Torts, 361; Sm. Landl. and Ten. 166.)

After seizure, the person distraining ought to make an inventory of the goods distrained, and serve it, with a written notice of the amount of rent due, and of the things distrained, on the tenant personally, or leave it on the premises, which will amount to an impounding of the distress, without the neces-

sity of actually securing it. (Sm. Landl. and Ten. 166-75; Tudor's Real Prop. Ca. 192-3; Add. Torts, 365, 369.)

PART III.  
TIT. II.  
CAP. II.

After the expiration of five days from a distress being made, and notice thereof and of the cause thereof being left on the premises, the distrainer may cause the chattels to be appraised by two sworn appraisers, and then sold, and the overplus, if any, left with the officer for the owner; unless the tenant replevy, or tender the rent and costs within the five days, or, in the case of growing crops, before the corn is ripe. (Add. Torts, 367, 369; Sm. Landl. Ten. 178; Woodfall, 389-91.)

Sale of distress.

As a general rule, all the goods and chattels on the demised premises, whether they belong to the tenant himself or to strangers who have placed them in the custody or possession of the tenant, are distrainable. But tenants' fixtures, in certain cases, are not distrainable; nor are beasts broken to harness, and regularly employed in work connected with the ordinary cultivation of the land, nor sheep or implements of a person's business or profession, so long as there are other distrainable chattels immediately available. Nor is wearing

What may be taken.

**PART III.** apparel actually on the person of the owner,  
**TIT. II.** or money ; nor are quickly perishable  
**CAP. II.** articles ; nor is the property of strangers standing on the demised premises, in the actual or constructive possession of such strangers, or necessarily placed there for trading or manufacturing purposes. (Add. Torts, 353-8 ; Woodfall, 366-76 ; Tudor's Real Prop. Ca. 188-90.)

Goods fraudulently removed.

Goods fraudulently or clandestinely removed after rent is due, in order to avoid distress, may, if a sufficient amount of other distrainable property is not left on the premises, be distrained within thirty days, if they have not been sold *bonâ fide* and for valuable consideration to a person ignorant of the wrongful act. And a penalty, to the amount of double the value of the things distrained, may be recovered. (Add. Torts, 360-1 ; Woodfall, 382-4 ; Tudor's Real Prop. Ca. 190.)

Excessive distress.

If a distress is manifestly beyond what is reasonably necessary for the purpose of realising the rent and expenses, the landlord is liable to an action for damages. (Add. Torts, 363 ; Woodfall, 400.)

Fixtures.

In the widest sense, fixtures are things

fixed to houses or lands. (See Amos & Ferard PART III.  
TIT. II.  
CAP. II. on Fixtures, 1, 2.)

As a general rule, as between the heir and the personal representative of a deceased tenant of the fee, and as between the owner of a particular estate and the person in remainder, and as between a landlord and tenant, the fixtures will belong, with the freehold to which they are annexed, to the heir in the first case, and to the person in remainder in the second case, and to the landlord in the third case; except such of them as are put up merely for ornament, domestic use, or purposes of trade, and are capable of removal without material damage to the inheritance; which, in the first case, devolve to the personal representative, if not essential to the enjoyment of the inheritance, and, in the second and third cases, if put up by the owner of the particular estate or the tenant, may be removed by him. (2 Ste. Com. 229-31.)

If a tenant of lands erects at his own expense, with the landlord's consent in writing, any buildings or machinery for agricultural or trade purposes, he may remove them, if he puts the land or building

**PART III.** into as good a condition as it was in before  
**TIT. II.** the erection was made, unless the landlord,  
**CAP. II.** on receipt of a month's notice of the intention to remove the erection, elect to purchase the same at a value to be ascertained by two referees or an umpire. (2 Ste. Com. 231.)

The tenant's right to remove fixtures may be controlled or modified by express stipulation or by local usage. (2 Ste. Com. 232.)

If a tenant who is possessed of fixtures which he has a right to remove, does not remove them during the term, they become a gift in law to the landlord, unless the tenant, after the expiration of the term, is permitted by the landlord to remain in possession, and removes them during his lawful possession. (Add. Torts, 127; Woodfall, 482.)

**Liability for  
fire.**

If premises are destroyed by fire, without any gross negligence on the part of the tenant, and the tenant has not covenanted to repair, the landlord will be without a remedy; though if fire is caused by gross negligence, the person guilty of such negligence will be liable. (Add. Torts, 128, 130; Sm. Landl. and Ten. 199; Woodfall, 435; Coote's Landl. and Ten. 246-8.) And where a tenant has covenanted to repair (unless he

excepted cases of fire), he or his assignee is bound to rebuild, in case the premises are burnt down. And in each case he must pay the rent, though he may have lost the enjoyment of the premises. (Woodfall, 344, 439-40; Smith's Landl. and Ten. 202.)

PART III.  
TIT. II.  
CAP. II.

Obligation  
to rebuild  
and pay rent,  
in case of  
fire.

Unless there is an agreement to the contrary, the occupier is the party liable to pay poor rates, highway rates, county, borough, and church rates. House, paving, watching, lighting, and cleansing rates also generally fall on the occupier. And he is also liable to the water rates, unless the annual value of the dwelling-house does not exceed 10*l.*; in which case it falls on the owner. The occupier has to pay the land and property taxes in the first instance; but he may deduct them out of his rent, as landlord's taxes, unless, in the case of land tax, the occupier has agreed to pay it. (Woodfall, 411-13, 430-1.) And, in the absence of an agreement to the contrary, the sewers rate falls on the landlord. (Coote's Landl. and Ten. 278.)

Liability to  
rates and  
taxes.

A tithe rent-charge is a charge on the land, and not on the person of the owner or occupier; but if the occupier pays it, he may deduct it from his rent, unless he has agreed

Tithe rent-  
charge.

PART III. to take it upon himself. (Sm. Landl. and  
TIT. II.  
CAP. II. Ten. 100.)

Duty of  
tenant as to  
use of the  
property.

A tenant of a house is bound to use it in a tenant-like manner, and a tenant of a farm to occupy it fairly and in a husband-like manner, and cultivate it according to the usage of the country where the land is situate. (Woodfall, 434, 448.)

Two kinds of  
repairs.

Repairs are of two kinds, substantial repairs and ordinary repairs. The former include those to the main walls, roofs, timbers, &c.; the latter, the common reparations to windows, shutters, doors, &c. (Woodfall, 432.)

Liability to  
repair.

The landlord is never liable to ordinary repairs, unless he has contracted to do them, even if the house is burnt down, and he has received the value from an insurance office. In the absence of agreement to the contrary, the tenant is always liable to them. A tenant from year to year is only bound to do such repairs as may be necessary in consequence of the negligence of himself or his servants, or to keep the premises wind and water tight. (Woodfall, 433-4, 447.)

Fences.

It is the duty of the occupier of lands to repair the fences. (Woodfall, 456; Dixon's Law of the Farm, 93.)

The property in timber, and in trees which are timber according to the custom of the country, is in the owner of the inheritance. The property in bushes is in the tenant. And he may clip the hedges, but he may not grub them up or destroy them. Such trees as are not timber at all, nor fruit trees, he may cut down, unless they afford a shelter to the house, or he is restrained by agreement. (Woodfall, 458, 460; Dixon's Law of the Farm, 80, 82-6, 97.)

PART III.  
TIT. II.  
CAP. II.

Trees,  
bushes, and  
hedges.

A tenant remaining after the expiration of a lease, may be taken to hold upon any of the terms of such lease that are consistent with a yearly tenancy. (Woodfall, 523.)

Continuance  
of contract  
by tacit con-  
sent.

Where the landlord claims the land from his tenant, it is not necessary for the landlord to prove his title to it; for it is a rule that a tenant or anyone claiming under him shall not be allowed to dispute his landlord's title, that is, the original right of the person who admitted him into possession; but he may show that it has since expired or been parted with. (Broom Com. 738-40; Roscoe on Evid. 667; 2 Selw. N. P. 696-7.)

Ejectment  
by landlord.

A tenant to whom a writ in ejectment is delivered, or to whose knowledge it comes, must, under penalty of forfeiting the value

Ejectment  
by a stranger.



PART III. of three years' improved or rack rent, forth-  
TIT. II.  
CAP. II. with give notice thereof to his landlord, that  
— he may be allowed to appear and defend.  
(Cole on Eject. 115 ; Broom Com. 742.)

## CHAPTER III.

## VENDORS AND PURCHASERS.\*

A MAN may dispose of his goods by sale to any person and in any manner he pleases. And he may so dispose of them, even where a writ of execution has been delivered to the sheriff; but the sale would be subject to the rights of the execution creditor, unless the sale was made in market overt, that is, in open market, for valuable consideration, and before seizure, to a bonâ fide purchaser, who had no notice of the writ. And even where a person is not the owner of goods, but has only the possession, as in the case of a thief or a finder, he may make a valid sale, if between sunrise and sunset, in market overt, to a bonâ fide purchaser, who does not know that they are not his property. In the country, market overt is only held on certain days and in a certain place. In the city of London, every day, except Sunday, is market day, and every shop is market overt, for things which

PART III.  
TIT. II.  
CAP. III.

Power of  
disposal.

Sale after  
execution.

Sale by a  
person who  
has not the  
property in  
the goods.

\* See the learned work of Mr. Justice Blackburn on the Contract of Sale.

PART III. are publicly exposed there for sale, and in  
TIT. II. which the shopkeeper professes to trade.  
CAP. III. — (Sm. Merc. Law, 484-6; Tudor's Ca. on M. L.  
603-6; Selw. N. P. 1335; 2 Ste. Com. 71-2.)

But a purchaser of goods or chattels in market overt acquires no title to them, if he buys them with knowledge of the vendor's want of title; as when he knows that the vendor is not the owner, or is an infant. And if they were stolen, and the thief is convicted, they revert in the owner on conviction, and the owner may then recover them from any person, even a purchaser for valuable consideration, without notice, who has them in his hands or under his control at the time they are demanded by the owner. But persons who buy and sell them again before the conviction, cannot be sued for the value of them. (Add. Torts, 198; Tudor's Ca. on M. L. 605-7; 2 Ste. Com. 72-3.)

A person who buys goods otherwise than in market overt acquires no better title than that possessed by his immediate vendor, even though such purchaser buys bona fide, without notice of any infirmity of title on the part of his vendor. And therefore, if they have been stolen, the owner may recover them from such purchaser, although

the thief has not been convicted. (Add. PART III.  
TIT. II.  
CAP. III. Torts, 199; Tudor's Ca. on M. L. 608.)

A purchaser gains no property in a horse which has been stolen, unless it be bought in a fair or market overt, after having been exposed there for an hour between ten in the morning and sunset, and the price, colour, and marks of it, and the names, additions, and abode of the vendor and purchaser have been taken down by the bookkeeper. And even then it may be reclaimed within six months, on tendering to the person in possession the price paid by him in market overt. (2 Ste. Com. 74; Oliphant on Horses, 45-6.)

According to the common law, goods might always be sold by a mere verbal agreement, either to be completed in *præsenti*, coupled with payment of the whole or part of the price, or a delivery of the goods or part of the goods, or to be completed in *futuro*, by a future payment of the price, or a future delivery of the goods, or by both. (Sm. Merc. Law. 488, 492; 2 Ste. Com. 68.)

Verbal contract.

If a person agrees to pay a certain sum of money for goods in *præsenti* or indefinitely, and the owner agrees to take it, and then they separate, this does not amount to a binding agreement, unless the goods or

PART III. a part of them were delivered, or the price  
 TIT. II. or some part of it, however trifling, was  
 CAP. III. — tendered, or unless the delivery or payment  
 was agreed to be postponed. (Sm. Merc.  
 Law, 488-90; 2 Ste. Com. 68; 2 Bl. Com.  
 457; Broom Com. 394-5.)

Written con- By stat. 29 Car. II. c. 3, s. 4, no action shall  
 tract. be maintained on any agreement for the sale  
 of goods, that is not to be performed within a  
 year from the making thereof, unless the  
 agreement be in writing, signed by the party  
 to be charged therewith or some other person  
 thereunto by him lawfully authorised.

By s. 17 of the same Act, no contract for  
 the sale of goods of the value of 10*l.* and  
 upwards shall be good, unless the buyer  
 shall accept part of the goods so sold, and  
 actually receive the same, or give something  
 in earnest to bind the bargain or in part  
 payment, or some note or memorandum in  
 writing of the bargain be made and signed  
 by the parties to be charged by such contract  
 or their agents lawfully authorised. (Sm.  
 Cont. 110, 113; Sm. Merc. Law, 494-5;  
 Broom Com. 402; 2 Ste. Com. 69, 70; Add.  
 Cont. 52.) And this is extended by the stat.  
 9 Geo. IV. c. 14, s. 7, to all contracts for the  
 sale of goods of the value of 10*l.* and upwards,

notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, produced, or provided, or fit or ready for delivery, or some act may be required for the making or completing thereof, or rendering the same fit for delivery. (Sm. Cont. 112 ; Broom Com. 403 ; 2 Ste. Com. 70 ; Add. Cont. 52.)

PART III.  
TIT. II.  
CAP. III.

Several documents may together constitute the contract, if sufficiently connected in sense among themselves, without the aid of parol evidence. (Sm. Cont. 113 ; Add. Cont. 167.)

A mere offer in writing made by one party, and not assented to by the other, is not a sufficient compliance with the requisitions of the statute. (Sm. Merc. Law, 503 ; 2 Chitty's Statutes, 158.)

An auctioneer is usually the agent of both parties until the deposit is paid. And if he or his clerk writes the purchaser's name in the sale book opposite the lot bought by him, that is a sufficient signature. (Sm. Merc. Law, 506 ; Broom Com. 414-6.) A broker is also the agent of both parties ; and he binds them by making and signing an entry of the contract in his book ; and he transmits to them copies of this entry, which are called bought and sold notes ; the bought

Auctioneer  
or broker the  
agent of both  
parties.

PART III. note being transmitted to the buyer, and the  
TIT. II. sold note to the seller. (Sm. Merc. Law, 507 ;  
CAP. III. Broom Com. 417-8 ; Add. Cont. 169.)

Warranty. Every affirmation at the time of the sale of personal chattels is a warranty, if it appears to have been intended as such, and if the contract and the affirmation are both oral. But even an express warranty, if after a sale, is void, for want of consideration. And no oral allegation previous to a sale by written contract, and no private communication previous to a sale by auction, can possibly operate as a warranty. An affirmation or representation, in order to be a warranty, must be made pending the negotiation ending in the sale, or pending the contract. (Sm. Merc. Law, 518-9, 522 ; Add. Torts, 638 ; Broom Com. 347-9.)

If the vendor has peculiar or exclusive means of information, and he pretends to know the truth, he will be taken to warrant his knowledge of the fact. Hence every representation as to the qualities of a horse made by the owner to the buyer, pending the negotiation which results in the sale, amounts to a warranty. And so, where a jeweller sells a glittering stone as a diamond, he impliedly warrants it

to be a diamond. (Add. Torts, 639, 641, 643; PART III.  
TIT. II.  
CAP. III.  
Broom. Com. 348-9.)

A person who undertakes to supply an article to answer a certain purpose, is deemed to warrant that it will answer such purpose. And where a person agrees to furnish manufactured articles, he is deemed to warrant them to be of a merchantable quality. (Sm. Merc. Law, 517; Add. Cont. 228-9; Morton's V. and P. 347.)

If a person by whom or by whose order an article is made, or by whom an article is sold to a person who has no opportunity of seeing it, represents that it is of some superior or peculiar quality, or that it is fit for a particular purpose, he is deemed to warrant that fact. And if a purchaser gives a shopkeeper reason to believe that he relies on the skill and judgment of the shopkeeper to supply an article fit for a particular purpose, the shopkeeper is deemed to warrant that the article supplied is fit for that purpose. But when the article has not been made by or by order of the vendor, and the means of examination are afforded to the purchaser, the representations of the vendor, if not made to induce the purchaser to forbear inspection or examination, and if believed to



PART III. be true by the vendor, do not constitute a  
 TTT. II. fraud in law, though untrue. (Add. Torts,  
 CAP. III. — 643-6; 2 Ste. Com. 75.)

A warranty does not extend to defects obvious to all mankind, and known to the purchaser at the time of the purchase. But a purchaser who relies upon a warranty is not bound to make any particular examination of the article before he buys. (See Add. Torts, 637; Morton's V. and P. 353-5.)

If a general dealer in provisions sells unwholesome food, he is liable to an action for deceit by anyone injured thereby. (Add. Torts, 651; Add. Cont. 230.)

Where a horse does not answer to a warranty, and the purchaser immediately tenders it back, and the seller refuses to take it, the purchaser need not resell it at once, but may keep it a reasonable time, in order to resell it to the best advantage, and may oblige the seller to pay the expenses of its keep as part of the damages. (Add. Torts, 668; Oliphant, 170.)

Implied war-  
 ranty as to  
 trade-marks.

By the stat. 25 & 26 Vic. c. 28, s. 19, it is enacted, that after the 31st of December, 1863, the sale of any article with a trade-mark shall be deemed to have been made with the warranty or contract, by the vendor with the

vendee, that such trade-mark was genuine and true, and not forged or counterfeit, and not wrongfully used, unless the contrary be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee.

PART III.  
TIT. II.  
CAP. III.

And by s. 20, after the 31st of December, 1863, where any article shall be sold with a description, statement, or indication of or respecting the number, quantity, measure, or weight thereof, or the place or country in which it shall have been made or produced, such sale shall be deemed to be made with the warranty or contract, by the vendor with the vendee, that no such description, statement, or indication was in any material respect false or untrue, unless the contrary shall be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee.

Implied warranty as to number, quantity, measure, or weight.

If a person who offers an article for sale at the ordinary market price is aware of any material latent defect, and does not disclose it, and knows that the purchaser is deceived by its appearance, he is responsible in damages for deceit. But if a defect can easily be discovered, and the purchaser has the opportunity of discovering it at the time,

Non-disclosure of defects.

PART III. then, in the absence of special reasons to the  
 TIT. II. contrary, the maxim *Caveat emptor* will  
 CAP. III. apply. (Add. Torts, 651-2; Add. Cont. 242.)

Sale by  
 sample.

On a sale by sample there is an implied warranty that the sample has been fairly taken from the bulk; but there is no implied warranty that there are no latent defects in the bulk unknown to the seller. (Add. Torts, 646; Morton's V. and P. 131-3.)

Sale with all  
 faults.

A sale of a chattel with all faults will not protect the vendor from an action for deceit, if he has been guilty of wilful deception. (Add. Torts, 653-4; Add. Cont. 243; Morton's V. and P. 130.)

Where the  
 property  
 passes.

If the thing sold is ascertained and completed, and nothing remains to be done on the part of the seller, as between himself and the buyer, before the delivery, and nothing is said as to the time of delivery, and either nothing is said as to the time of payment, or the goods are sold on credit, then, in the absence of special reasons to the contrary, the property in the goods immediately passes to the buyer, and that in the price to the seller. And the seller is bound to deliver them, when demanded, upon payment of the price. But a chattel which is to be delivered in futuro does not usually pass by

the contract. And if the thing sold remains to be ascertained or completed, or if any act remains to be done on the part of the seller before delivery, then, as a general rule, the property does not pass until that act has been done. Thus, where goods have to be marked, weighed, counted, measured, or tested, in order to identify them, or to determine the price, there, in general, the property will not pass until that be done. (Broom Com. 396-7, 400-1; 2 Selw. N. P. 1334; Tudor Ca. on M. L. 515-17, 523-8.)

PART III.  
TIT. II.  
CAP. III.

The property in a chattel which is not yet in existence does not pass by a contract for the sale of it. And a grant of goods not belonging to the grantor at the time, will pass no property in them at law, even by relation, after they are acquired. (Sm. Merc. Law, 492-3; Tudor Ca. on M. L. 528.)

The buyer of goods has the risk as soon as the property in them has passed to him. (Sm. Merc. Law, 493; 2 Ste. Com. 68; Add. Cont. 183.)

Goods delivered on 'sale or return' are deemed to be sold, unless returned within a reasonable term. (Broom Com. 397; Tudor Ca. on M. L. 528.)

Delivery on  
sale or re-  
turn.

The vendor is not entitled to the price

PART III.  
TIT. II.  
CAP. III.

Right to the  
price and to  
the goods.

until he delivers the goods; nor is the purchaser entitled to the goods until he tenders the price; unless, in either case, it is otherwise agreed. But in a present contract of sale on credit, the right to the possession of the goods passes immediately to the purchaser, unless there is an apparent intention to the contrary. (Selw. N. P. 1334; Sm. Merc. Law, 489; 2 Ste. Com. 69; Add. Torts, 200; Tudor Ca. on M. L. 516.)

Vendor's  
duty to de-  
liver.

After a sale of specific ascertained chattels at a fixed price, it is the vendor's duty to deliver them, upon payment or tender of the price, and performance of all other conditions (if any) on the purchaser's part. If the vendor refuses so to deliver them, he may be sued, either specially for breach of his contract, or in trover or detinue for the goods. (Add. Torts, 200; Sm. Merc. Law, 510.)

Delivery to  
an agent.

Delivery to the purchaser's agent is in general equivalent to a delivery to the purchaser himself. (Broom Com. 398-9; Tudor Ca. on M. L. 522.)

Refusal to  
accept the  
goods.

If the purchaser refuses to accept the goods after the vendor has performed all conditions on his part, the vendor may sue him, either specially on his contract for the damage sustained, or (if the property has passed to

him) for the price in an action for goods bargained and sold. (Sm. Merc. Law, 523-4.)

PART III.  
TIT. II.  
CAP. III.

When no price is fixed, the vendor is entitled to receive their fair value, or, in the absence of proof as to their value, the lowest price of goods of that description. (Sm. Merc. Law, 529; Morton's, V. and P. 70-1.)

Sale without stipulation as to price.

In case of the neglect of a purchaser to pay for goods delivered, the vendor may recover the price, in an action for goods sold and delivered. (Sm. Merc. Law, 527.)

Neglect to pay price.

A stipulation or enactment that a sale shall be void on breach of a condition by one party, only renders it void at the election of the opposite party. (Sm. Merc. Law, 509.)

Effect of provision for avoidance of a contract by one party.

Although a parol alteration of a written contract is not allowable, yet it may be entirely rescinded by parol. (Sm. Merc. Law, 504.)

Rescinding or altering a contract.

The mere sale of the goodwill of a business will not prevent the vendor from setting up a similar business, even next door to the purchaser, or soliciting the custom of his former customers. But if he has engaged to abstain from carrying on a similar business, he will then be bound, provided the restriction be within reasonable limits. And he is not at liberty to set up a precisely similar business under the old style or firm, although his name be the only one which, with the

Sale of 'goodwill.'

**PART III.** addition of the words 'and Co.,' constitutes  
**TIT. II.** the old style or firm. Nor is he at liberty  
**CAP. III.** in any other manner to hold out that he is  
 carrying on business in continuation of, or  
 in succession to, the business carried on  
 by the old firm. The mere sale does not  
 oblige him to introduce the purchaser to the  
 customers, or to recommend him to them, or  
 to do any one act for the purpose of giving  
 effect to the sale. But if the vendor has  
 expressly engaged to do any such specific  
 act, he will be compellable to do it, or may  
 be made to pay damages for the breach of  
 his agreement. (Sm. Law of Prop. 553.)

Contracts  
and cove-  
nants to sell  
or transfer  
property do  
not consti-  
tute a legal  
charge.

At law, contracts and covenants to sell,  
convey, or transfer land or other property,  
are considered simply as personal and execu-  
tory contracts and covenants, and not as  
attaching to the property in any manner as  
a present or future charge or otherwise. (Sm.  
Law of Prop. 556.)

Vendors and  
purchasers of  
real estate  
and chattels  
real.

The subject of vendors and purchasers of  
real estate and chattels real is one which is  
more peculiarly connected with Equity and  
Conveyancing; and the student is con-  
sequently referred to the books on those  
branches of law for information on that  
subject.

## CHAPTER IV.

MORTGAGORS AND MORTGAGEES, PLEDGORS AND  
PLEDGEES, AND PERSONS HAVING A LIEN.I. *Mortgagors and Mortgagees.\**

A LEGAL mortgage is a security created by means of a transfer, by a debtor to his creditor, of the legal ownership of real or personal estate, subject to be defeated on the discharge of the debt. (Sm. Law of Prop. 340.)

PART III.  
TIT. II.  
CAP. IV.  
—  
Legal mort-  
gage defined.

So long as the mortgagor remains in possession, the mortgagee's estate is not absolute, even at law. For by the stat. 15 & 16 Vic. c. 76, s. 219, 220, if an ejectment be brought by the mortgagee, and no suit be pending in any Court of Equity for redemption or foreclosure, the payment of principal, interest, and costs shall, except in certain

Mortgagor's  
and mort-  
gagee's  
estate and  
rights.

\* On this subject (which is but slightly noticed here, as being more peculiarly connected with Equity and Conveyancing), the student is referred to Smith's Law of Property, and to the works therein cited.



PART III. cases, be deemed a satisfaction of the mort-  
TIT. II. gage, and the Court may compel the mort-  
CAP. IV. gagee to reconvey the estate. But when the  
mortgagor has ceased to be in possession,  
and there has been a default in payment of  
the money at the stipulated time, the estate  
of the mortgagee becomes absolute at law.  
Yet his estate is in equity treated as a mere  
security for the principal and interest and  
costs properly incurred in relation to the  
mortgage, and follows the nature of the  
debt. And although, where the mortgage is  
in fee, the legal estate descends to the heir  
of the mortgagee, yet, in equity, it is deemed  
a chattel interest and personal estate, and  
belongs to the personal representatives as  
assets.

The mortgagee is entitled to enter into  
possession of the lands, and, after notice to  
the tenants, to recover the rents and profits,  
unless there is some agreement to the con-  
trary; and if the security is insufficient, he  
may fell timber, and sell it, and apply the  
produce towards the liquidation of his debt;  
but, with this exception, he may not commit  
waste. He may grant leases, subject to the  
equity of redemption, and avoid, by eject-  
ment, without notice, any leases that have

been made by the mortgagor, without his concurrence, subsequently to his mortgage. He must, however, account for the rents he receives, and pay an occupation-rent for such part as he may keep in his own possession.

PART III.  
TIT. II.  
CAP. IV.

The mortgagor is not entitled to the possession in respect of his equitable estate, unless there is some special agreement to that effect, but he holds it solely at the will of the mortgagee, who may generally at any time, without giving any prior notice, recover the same by ejectment against him, unless he is ready to pay principal, interest, and costs, or against his tenants under a tenancy created subsequently to the mortgage, and not confirmed by the mortgagee; and he is not even entitled to reap the crop. But so long as he continues in possession by the permission of the mortgagee, he is entitled to take the rents and profits in his own right without rendering any account whatever to the mortgagee, though the mortgaged property may have become an insufficient security.

A person may create an equitable, though not a legal, mortgage, by a mere memorandum or a mere deposit of deeds. (Sm. Law of Prop. 343-4, 358, 372.)

Mortgage  
by memoran-  
dum or de-  
posit.

## II. *Pledgors and Pledgees.*

**PART III.** A pledge of personal chattels differs from a  
**TIT. II.** mortgage; for a pledge only passes a special or  
**CAP. IV.** qualified property or ownership to the pawnee,  
 with a power of sale in case of non-payment  
 at the stipulated time; and the pawnor retains the general property or ownership, and may transfer it both at law and in equity; whereas a mortgage passes the general property or ownership to the mortgagee, though conditionally. (Sm. L. C. 194; Broom Com. 786; Sm. Law of Prop. 374.)

Difference  
between a  
pledge and a  
mortgage.

Suing the  
pawnee.

The pawnor may sue the pawnee for the debt, though he retain the pawn; for the pawn is only a collateral security. (Sm. L. C. 194.)

Transfer of  
possession.

Transfer of the possession of the chattel to the pawnee is essential. (Sm. L. C. 196.)

Sale of  
pledges by a  
pawnbroker.

If the pledge is made to a pawnbroker, and is not redeemed at the expiration of a year and a day, the pawnbroker may then sell it by auction; unless the pawnor give a notice to the contrary; in which case the sale must be postponed for three months. But if, before the sale, the pawnor or his assignee tender the principal and interest due, together with the expenses (if any)

incurred, the chattel must be returned. PART III.  
TIT. II.  
CAP. IV.  
(Broom Com. 785; Sm. L. C. 196-7.)

If stolen property has been pledged with a pawnbroker or any other person who had Stolen property pledged. no knowledge of the theft, the owner may sue the pledgee. (Add. Torts, 199; Rosc. Evid. 635.)

Any person showing probable grounds for suspecting that his goods have been unlawfully pawned, may have a search warrant, and regain them, if so pawned. And the sale of them by any pawnbroker in London, or within two miles of it, will not alter the property. (2 Ste. Com. 72; Rosc. Evid. 635.)

### III. *Persons having a Lien.*

Liens are either legal or equitable.

A legal lien is the right of a person to retain property of which he has the lawful possession, until a debt due to him has been satisfied. (Sm. Merc. Law, 563, 570; Cross on Lien, 2, 30-8.) Legal lien.

An equitable lien is a hold upon property for the satisfaction of a claim attaching thereto, under an express charge or contract or constructive trust. (Sm. Law of Prop. 337.) Equitable lien.

There are two species of legal liens, namely, Two kinds of legal liens. particular liens and general liens.

PART III. Particular liens are liens upon goods in  
 TIT. II. respect of money due on them, or of labour,  
 CAP. IV. trouble, or care expended upon them; and  
 ———  
 Particular. these liens are favoured in law. So that  
 unpaid vendors of chattels not parted with,  
 parties who have advanced money on the  
 security of chattels, innkeepers, common  
 carriers, shipowners, sailors, factors, artisans,  
 and others to whom chattels have been  
 delivered, in order that such persons might  
 bestow labour, trouble, or care upon them,  
 for a pecuniary consideration, have a lien  
 upon them for it.

General. General liens are liens in respect of a  
 general balance, due in the ordinary course  
 of dealing in the same business; and these  
 are founded on express agreement or custom  
 only, or the previous course of dealing, which  
 must be proved by the bailee; and they are  
 taken strictly. Warehousemen, factors, in-  
 surance brokers, bankers, and solicitors have  
 a general lien. (Add. Torts, 277-8, 282-5;  
 2 Ste. Com. 81; Sm. Merc. Law, 564-5;  
 Cross on Lien, 14, 15, 20, 23-4.)

Rules as to  
 the exist-  
 ence,  
 transfer, and  
 cesser of  
 liens.

A lien must not be at variance with the  
 terms or implied understanding upon which  
 the property was received. (Add. Torts,  
 279, 282.)

It cannot be transferred. (Add. Torts, PART III.  
TIT. II.  
CAP. IV. 288.)

A lien can only exist where either payment is to be made in ready money, or security is to be given immediately on the completion of a work.

If security, such as a bill, note, or bond, payable at a distant day, is taken for a debt for which the creditor has a lien, or a new agreement is come to for payment of such a debt in a particular manner, the lien is gone. (Add. Torts, 280; Sm. Merc. Law, 570-1.)

If a bailee voluntarily parts with the possession of property upon which he has a legal lien, the lien ceases. (Add. Torts, 288; Sm. Merc. Law, 569; Cross on Lien, 38.)

A lien may be at once extinguished by a tender of the money. (Add. Torts, 288; Sm. Merc. Law, 570.)

When a person has merely a right of lien *sale*. on goods, he has no right to sell them. (Add. Torts, 193; Cross on Lien, 47.)

## CHAPTER V.

## PARTNERS.\*

**PART III.** **PARTNERSHIP** is the voluntary association of  
**TIT. II.**  
**CAP. V.** two or more persons, who contribute money,  
 effects, labour, or skill, for the purpose of  
 carrying on, as principals, a common under-  
 taking, for a lawful object, for their common  
 profit. (See Sm. Merc. Law, 20; Tudor Ca.  
 on M. L. 303-4, 307; Lindley, 1; and infra.)

Partnership  
defined.

Contract of  
partnership.

The partnership contract need not be in writing, but may be entered into verbally, or inferred from the conduct of the parties. (Sm. Merc. Law, 26; Lindley, 81, 87-9.)

Articles of  
partnership.

An agreement in writing for a partnership is designated by the name of articles of partnership. (Sm. Merc. Law, 32; 2 Ste. Com. 98; Lindley, 88.)

Who may be  
partners.

Each of the partners must be competent to contract; and therefore, if the contract of partnership is attempted to be entered into by an infant, it will be avoidable at his full age; and if by an alien enemy, it will be void; and if by a married woman, it will be

\* As this Manual relates only to that portion of Common Law which is termed Private Law, it does not include the law of Joint-stock Companies, the statutory part of which has just been consolidated by the statute 25 & 26 Vic. c. 89.

void, except by special custom, or upon the civil death, transportation, or judicial separation of the husband, or in respect of separate estate. (Tudor Ca. on M. L. 305-6; Sm. Merc. Law, 23; Lindley, 74, 77, 79.)

PART III.  
TIT. II.  
CAP. V.  
—

A community of profit is the true criterion of a partnership. This is essential; but an equality of profit is not necessary; nor is it necessary that there should be a community of that which produces the profit, or a community of loss. For, by express stipulation, one partner may be exonerated from all loss, as between himself and his companions, though he will nevertheless be liable to strangers; and one partner may contribute all the money, all the stock, or all the labour. (Sm. Merc. Law, 20-2; Broom Com. 536; 2 Ste. Com. 100-1; Tudor Ca. on M. L. 306, 308; Lindley, 10, 16, 57.)

Criterion  
and requi-  
sites of a  
partnership.

A person may be a partner with one only of a firm, in respect of his share, without being a partner with the others. And persons may stand in the position of partners as to third persons, without being partners inter se. Thus, if a person stipulates for a share in the profits, not as a principal, so as to give him a right to an account, but as a mere agent, factor, or servant, he is not a partner as between himself and his em-

Different po-  
sitions of  
persons in-  
terested in  
the profits.



**PART III.** ployers, but he is a partner as to third persons. But a person may have a direct  
**TIT. II.** interest in the profits, by stipulating that he  
**CAP. V.** shall receive, as agent, factor, or servant, a sum proportioned to the gross profits, without being a partner, even as to third persons. So that a person having a virtual interest in the profits, may, in respect of that interest, be a partner, both as regards the other person or persons engaged in the undertaking, or one of them, and as regards strangers; or he may be a partner as regards strangers only; or he may not be a partner in any respect. (See Sm. Merc. Law, 22; Broom Com. 536-7; Tudor Ca. on M. L. 304, 310-11; Lindley, 13, 34.)

**Dormant partner.**

A dormant partner, that is, one who participates in the profits, but does not appear to the world as a partner, is responsible for the engagements of the firm. (Sm. Merc. Law, 21; 2 Ste. Com. 100; Tudor Ca. on M. L. 311; Lindley, 34, 902.)

**Nominal partner.**

Even without entering into any contract, a man may incur the liabilities of a partner, as between himself and third persons, by lending his name and credit to a firm, or in any manner holding himself out to the world as a partner therein. Such a person is called a nominal partner. (Sm. Merc. Law, 24;

Broom Com. 540; 2 Ste. Com. 100; Tudor PART III.  
TIT. II.  
CAP. V.  
Ca. on M. L. 212; Lindley, 902.)

A new partner cannot be introduced without the consent of every member of the firm; insomuch that the executors of a deceased partner do not become partners in his stead, unless the partnership contract contains a stipulation that they shall be admitted in his place. (Sm. Merc. Law, 25, 32; Tudor Ca. on M. L. 304; Lindley, 702, 890.)

Admission of  
a new partner.

Executors of  
a deceased  
partner.

But if an executor once becomes a member of his testator's firm, though only in trust for the persons interested in the testator's estate, he will render himself liable, both in person and estate, for its engagements; insomuch that he may even be made bankrupt in respect of such liability. (Sm. Merc. Law, 33; Lindley, 809, 882.)

Liability of  
executors on  
becoming  
partners.

Partners are jointly, and, unless there is Shares. evidence to the contrary, are taken to be equally, interested in the partnership stock and effects, and the profits. Yet, in equity, a partner may have little or no valuable interest in the concern, but may be indebted to it; for, in equity, each of the partners may buy or borrow from the firm, and the firm from each of them. (Sm. Merc. Law, 29; Tudor Ca. on M. L. 306, 308, 312; Lindley, 573.)

**PART III.** Where all the capital is contributed by  
**TIT. II.** one, and all the labour by another, the latter  
**CAP. V.** is in some cases entitled to a share in the capital, while in others he is not: it depends upon the intention of the partnership. (Sm. Merc. Law, 30; Lindley, 573-4.)

On the death of a partner, his share in the capital stock does not go to his copartner, but forms part of his personal estate. (2 Ste. Com. 48.)

**Conduct.** A partner must be thoroughly faithful towards his copartners. He must not place himself in a situation likely to give him a bias against his duty. And if he obtains any advantage in the course of the partnership dealings, he will be a trustee of it, in equity, for their benefit. (Sm. Merc. Law, 30-1; Tudor Ca. on M. L. 320-1; Lindley, 492-3, 504.)

One partner may not exclude another from the equal management of the concern; and each partner ought to devote an amount of time, care, and trouble to the business, and to keep proper accounts. (Tudor Ca. on M. L. 321; Lindley, 464-5.)

**Power of individual partners.** Each partner is deemed the agent of the rest, whether they be actual or nominal, acting or dormant, and has authority, as such, to bind them to any person dealing bonâ fide, either by such contracts respect-

ing the goods or business of the firm as are within the ordinary scope of the partnership dealings, or by negotiable instruments circulated in its behalf, where the purposes of the firm require that its members should pass such instruments, notwithstanding any agreement among the partners, unknown to such person, that no partner shall have such authority. Each partner may also bind the rest by a loan or a purchase connected with the business, or by a sale or pledge of the joint property, though he instantly apply the money or goods to his own use; provided the person with whom he dealt had no reason to suppose that a fraud was intended. And where an act of one partner is binding on all, each is liable upon it in his individual capacity, as regards his separate estate, as well as in respect of the partnership property. (Sm. Merc. Law, 38-43; Broom Com. 539-42; Tudor Ca. on M. L. 312, 314; 2 Ste. Com. 98-9; Lindley, 213-4, 216.)

PART III.  
TIT. II.  
CAP. V.  
—

Each partner may pay or satisfy a debt, so as to exonerate the firm, and give time to a partnership debtor, and execute a valid release in the name of the firm, and thereby preclude them from suing. And payment, release, or discharge to one partner, is payment, release, or discharge to all, even after

**PART III.** a dissolution, and notwithstanding a clause in  
**TIT. II.** the deed of dissolution that another partner  
**CAP. V.** shall receive all the debts. But partners are  
 not bound by any contract made with their  
 copartner, as an individual and on his own  
 account. (Sm. Merc. Law, 38-9, 41, 54, 57;  
 Tudor Ca. on M. L. 331; Lindley, 221-2,  
 229, 232, 236.)

A partner cannot bind the firm by deed, unless authorised by deed to do so. (Broom Com. 544; 2 Ste. Com. 99, 100; Lindley, 223.)

Partners in a trade strictly mercantile may bind each other by bills or notes in the name of the firm. (Sm. Merc. Law, 45; Lindley, 213.)

**Remedies.**  
**Action by**  
**one partner**  
**against an-**  
**other.**

**Suit in Chan-**  
**cery.**

An action will lie, by one partner against another, for a balance due on an account taken, where the balance has been struck, and in some other cases of partnership. But a partnership account is usually taken in Chancery. (Sm. Merc. Law, 34-7; Tudor Ca. on M. L. 323-6; 2 Ste. Com. 102; Broom Com. 537-8; Lindley, 735.)

**Commence-**  
**ment of li-**  
**ability, and re-**  
**sponsibility**  
**of partners.**

The liability of a partner to third persons, in respect of the engagements of his co-partners, commences with his admission into the firm; so that he will not in general be liable on a contract effected before he was admitted.

(Sm. Merc. Law, 48; Broom Com. 546; Tudor Ca. on M. L. 314; Lindley, 311-12.)

PART III.  
TIT. II.  
CAP. V.

If one partner makes an admission, acknowledgment, or representation, his co-partners are generally bound by it. And if notice is given by or to one partner, it is tantamount to notice by or to all. And if one partner is guilty of a breach of contract, negligent wrong, or fraud, in conducting the business of the firm within the scope of his authority, the others are generally liable. (Sm. Merc. Law, 47-8; Lindley, 230-53.)

As to those who have not dealt with a firm before its dissolution, the liability of a partner ceases upon his dissolving the partnership, removing his name from the firm, and giving general notice of the dissolution in the 'Gazette.' But particular notice must be given to those who have previously dealt with the firm. (Sm. Merc. Law, 49; Broom Com. 547; Tudor Ca. on M. L. 315; 2 Ste. Com. 102; Lindley, 324, 327, 330, 335-6.)

Cessation of  
liability.

The retiring partner will still, however, remain liable in respect of engagements prior to the dissolution, unless the creditor who seeks to charge him has, expressly or impliedly, agreed to the substitution of the credit of the new firm for that of the old.

PART III. (Tudor Ca. on M. L. 315, 318-9; Broom  
TIT. II. Com. 547; Lindley, 337, 353.)  
CAP. V.

The liability of a dormant partner ceases on his retirement, except as to persons who knew him to be a partner, and to whom he has not given notice of his retirement. (Broom Com. 548; 2 Ste. Com. 102; Tudor Ca. on M. L. 315; Lindley, 326.)

On the death of a partner, his personal representative is exonerated at law; but in equity the estate of the deceased is liable until his debts have been discharged. (Sm. Merc. Law, 51; Tudor Ca. on. M. L. 316.)

Rights of  
creditors.

The creditors of the partnership have a right to the payment of their debts out of the partnership funds, before the private creditors of either of the partners, although, at law, this is generally disregarded. On the other hand, in equity, the separate creditors of each partner are entitled to be first paid out of the separate effects of their debtor, before the partnership creditors can claim anything, although, at law, a joint creditor may proceed directly against the separate estate. (Sm. Manual of Equity, 317; Tudor Ca. on M. L. 316, 356.)

Dissolution.

A partnership may be dissolved: 1. By effluxion of time. 2. By mutual consent. 3. By the decree of a Court of Equity, in

case the partnership undertaking originated in fraud, misrepresentation, or oppression, or cannot be carried on at all, or at least according to the stipulations in the articles, or without injury to all the partners; or in case of the permanent insanity or incapacity or the gross misconduct, as partner, of one of the firm; such as refusing to account for his receipts. 4. If no limit was originally fixed, it is called a partnership at will, and may be dissolved by either partner at a moment's notice, unless such a dissolution would be in ill-faith, or would work an irreparable injury. 5. The entire partnership is also dissolved by a general assignment by one or more of the partners, or by an execution on the partnership effects by a creditor, or by the bankruptcy of any partner, or by his outlawry, or by his attainder of treason or felony. 6. And the death of a partner, or the marriage of a female partner, operates as a dissolution. But in the case of a partnership of three or more persons, the other persons may, of course, come to a new agreement to carry on the business upon the old terms. (Sm. Merc. Law, 27-8; Sm. Manual of Equity, 315; 2 Ste. Com. 98; Tudor Ca. on M.L. 331-9; Lindley, 178-87.)

PART III.  
TIT. II.  
CAP. V.



**PART III.** the person to whom it is addressed, the  
**TIT. II.** drawee, and, if he accepts it, the acceptor;  
**CAP. VI.** the person in whose favour it is made, the  
 --- payee. (Sm. Merc. Law, 206; Chit. B. 5;  
 Broom Com. 433-6; Byles, 1.)

**Accommo-  
 dation bill.**

An accommodation bill is a bill which is accepted without value passing, merely to accommodate the drawer, by enabling him to get it discounted. And it sometimes happens that two persons agree to mutually draw upon one another, without any value passing; and the drawer in each case gets his banker, or some other person relying on the credit of the drawer and acceptor, to discount the bill, so as to raise money, for purposes of speculation and other purposes; the discounteer not knowing but that the full value passed, and the acceptor hoping to have funds to pay the bill at maturity. In these cases there is an implied contract on the part of the drawer, as the party accommodated, to pay the bill at maturity, and to indemnify the acceptor in case he is obliged to pay it for him. (Ste. Lect. 50-2; Broom Com. 436, 481.)

**Holder of a  
 bill.**

The owner of a bill is called the holder, or, where it is transferable by delivery, the bearer. (Chit. B. 19.)

**Cheque de-**

A cheque is a species of bill of exchange. It is an order or request, made in writing, or

partly in print and partly in writing, to a PART III.  
TIT. II.  
CAP. VI. banker by his customer, to pay a certain sum to a person or bearer or order, on demand.

A bank-note is a promissory note made by a banker, payable to bearer on demand, and circulated as money. (Sm. Merc. Law, 206; Broom Com. 473; Byles, 9, 13.) Bank-note defined.

A cheque is in general subject to the same rules as a bill of exchange. But it does not require acceptance, and, in the ordinary course, it is never accepted: it is not intended for circulation, but is given for immediate payment, and should be presented for payment, or, if the parties live at a distance, forwarded for presentment, not later than the day after the day on which it is received: it is not entitled to days of grace: it may be, but it is not ordinarily, indorsed. (Broom Com. 454; Add. Torts, 204; Byles, 13, 18, 19.) Difference between a cheque and a bill of exchange.

A promissory note (or note of hand) is a written promise, signed by the promisor, but not sealed, to pay, at a specified time, a certain sum of money, unconditionally. The promisor is called the maker; and the promisee, or person to whom the promise is made, is called the payee. (Sm. Merc. Law, 206; Chit. B. 10; Broom Com. 464, 467; 2 Ste. Com. 123; Byles, 5.) Promissory note defined.

**PART III.** Those only can be parties to a bill or note  
**TIT. II.**  
**CAP. VI.** who would be capable of entering into any other contract. A married woman cannot charge either herself or her husband by making, drawing, accepting, or indorsing negotiable instruments, except as agent for her husband; or except he is under a civil incapacity of residing here, or she has been judicially separated from him. But in certain cases she may render her separate estate liable in equity.

Parties to a bill or note.

If, however, a bill or note is made or indorsed payable to the order of a married woman simpliciter, her husband may negotiate or sue upon it, either in his own name or in the joint names of himself and his wife. But if it is made or indorsed payable to her alone, or in terms excluding him, he cannot either sue upon it in his own name, or transfer it, but he may reduce it into possession, by receipt of the sum payable, or by suing upon the instrument in the joint names of himself and his wife. (Sm. Merc. Law, 221; Byles, 58-60; Chit. B. 8, 12-17.)

Requisites in a bill or note.

It is not essential that a bill or note be in any particular form of words. But there is an established form, to which it is very desirable to adhere, in order to prevent questions

from arising. And in a bill or note there must be an order or promise to pay. A mere supplication or acknowledgment\* will not suffice. The instrument must be for the payment of money alone, and not 'cash or bank-notes.' The money payable must be a definite amount. And it must be payable absolutely and unconditionally, and, if a time is specified, at a time which is sure to arrive, though it be uncertain when it will arrive. (Sm. Merc. Law, 208-10; Chit. B. 81-90; Broom, 467; Byles, 68, 71, 83-6.)

PART III.  
TIT. II.  
CAP. VI.

The following is the form of an inland bill: Form of a bill.

London, January 1, 1862.

£100 0s. 0d.

At sight [*or on demand, or at*  
(Stamp) days after sight, *or at* days *or*  
months after date] pay to C.D.  
or order [*or to C. D. or bearer, or to*  
C.D., *or to bearer, or to my order*] One  
hundred pounds [*for value received*].

JOHN WOOD.

To Mr. Thos. Jones, Merchant,  
at Liverpool.

\* A mere acknowledgment of a debt, which requires no stamp, and on which an action may be brought, is often made thus: I O U.

London, January 1, 1862.

Mr. A. B.

I O U £100.

C. D. (Byles 26, 27.)

PART III. The following is the form of a promissory  
TIT. II.  
CAP. VI. note:—

Form of a  
note.

London, January 1, 1862.

£100 0s. 0d.

[Two] months after date [or on de-  
(Stamp) mand, or at sight, or at days  
after sight] I promise to pay to C. D.  
or order [or to C. D. or bearer, or to  
C. D., or to the order of C. D., or to  
bearer] One hundred pounds [for  
value received].

JOHN WOOD.

(Sm. Merc. Law, 212; Broom Com. 435,  
467; 2 Ste. Com. 123; Byles, 68-80.)

Date. A date is not essential to a bill or note. If  
omitted, the instrument will be considered as  
dated at the time it was made. (Byles, 69;  
Sm. Merc. Law, 215; Chit. B. 99.)

'Month.' In the case of a bill or note, a month  
means a calendar month. (Byles, 188; Sm.  
Merc. Law, 215; Chit. B. 257.)

Considera-  
tion. A bill or note is, *primâ facie*, presumed to  
have been given for a sufficient consideration,  
unless the defendant sets up, as a defence in  
toto, that he received no consideration, or, as  
a defence pro tanto, that he received no  
sufficient consideration, or makes out a  
*primâ facie* case sufficient to put the plaintiff

upon proof of consideration. But this defence will be of no avail, if the holder himself or some intermediate holder took the bill or note *bonâ fide*, and paid a valuable consideration for it. (Sm. Merc. Law, 269-70; Byles, 108-9, 112; Chit. B. 47, 50; Broom Com. 433, 479-80; Sm. Cont. 143-4; 2 Ste. Com. 122.)

PART III.  
TIT. II.  
CAP. VI.

Illegality of the consideration vitiates a bill or note in the hands of the original parties, and also in the hands of third persons who have not given value for it, or have taken the instrument after it was due, or have taken it with notice from a person who is not an innocent indorsee for value. (Sm. Merc. Law, 272; Chit. B. 55, 62; Broom Com. 480; Sm. Cont. 250.)

Bills or notes are either inland or foreign.

An inland bill or note is one drawn or made in any part of the United Kingdom or adjacent islands, and made payable or drawn upon any person resident there. A foreign bill or note is one drawn or payable, or both drawn and payable, abroad. (Sm. Merc. Law, 211; Byles, 366; Chit. B. 5; Broom Com. 461; 2 Ste. Com. 113.)

Inland and  
foreign bills  
or notes.

Foreign bills are often drawn in three or more parts; all the parts together making

Foreign bills  
in parts.

**PART III.** what is called a set, and the whole set con-  
**TIT. II.** stituting but one bill. Each part contains  
**CAP. VI.** a condition that it shall continue payable  
 so long only as the others remain unpaid. This practice is adopted in order that if one be lost, the party entitled may secure his money on the other. (Chit. B. 104; Sm. Merc. Law, 219; Byles, 362; Broom Com. 461.)

By what law  
bills are  
governed.

In the case of a bill drawn in England and payable abroad, the obligation of the acceptor will be governed by the law of the place where it is payable; but the obligation of the drawer by the English law. (Sm. Merc. Law, 212; Byles, 371-3; Chit. B. 116.)

Transfer of  
bill or note.

If a bill or note is made payable simply to a particular individual, without the word 'bearer' or 'order,' it is not negotiable, though it is valid as between the original parties. If it is payable to a particular individual or his order or assigns, he may transfer his right to a third person, by indorsing his own name upon it and delivering it to him; if to bearer generally, or to a particular individual or bearer, it may be transferred by mere delivery. (Sm. Merc. Law, 216; Chit. B. 10, 160-1.)

Designation  
of payee.

The payee may be designated either by name or by description, as 'the trustee acting

under A.'s will : ' or a blank may be left for the payee's name ; in which case any bona fide holder may insert his own name. (Sm. Merc. Law, 217 ; Byles, 72 ; Chit. B. 90, 160-1.)

PART III.  
TIT. II.  
CAP. VI.

If indorsed by the payee, a promissory note becomes exactly similar to a bill of exchange ; for then it is in effect an order by the indorser of the note upon the maker to pay to the indorsee : the indorser then stands in the situation of the drawer of a bill ; the maker is in the position of the acceptor of a bill, as the person primarily liable ; and the indorsee becomes the payee. (Sm. Merc. Law, 207 ; Chit. B. 6, 134 ; Broom Com. 468-9 ; 2 Ste. Com. 124.)

Similarity of  
a note, when  
indorsed, to a  
bill.

The law of bills is generally applicable to notes, except that, as there is no third party or drawee in a note, the points respecting an acceptance have no application to a note. (2 Ste. Com. 123.)

Application  
of the law of  
bills to notes.

Indorsements are either in full or in blank. A full or special indorsement is one which mentions the name of a person in whose favour it is indorsed, as where it is made payable by the indorsement to C. D. or order.

Indorse-  
ment and  
transfer of  
bills or notes.  
Full or  
special in-  
dorsement.

An indorsement in blank is one which is effected by the holder merely writing his

Indorse-  
ment in  
blank.



PART III. name on the back of the bill, without making  
 TIT. II. it payable to any one in particular. (Sm.  
 CAP. VI. — Merc. Law, 229; Broom Com. 437, 450;  
 2 Ste. Com. 114; Byles, 136-7; Chit. B.  
 161, 163-4.)

A bill or note indorsed in blank passes by mere delivery, and becomes payable to any bonâ fide holder. But a bill or note indorsed in full will not pass from the person to whom it was so indorsed in full without being indorsed by him, either in full or in blank. Whether indorsed in full or in blank, the instrument is delivered over to the assignee, who is called the indorsee; and he also may indorse it, either in full or in blank, so as to transfer it to another; and so on in infinitum. (Sm. Merc. Law, 230; Broom Com. 432, 437, 450; Chit. B. 161; Byles, 136-7; 2 Ste. Com. 114.)

Bill indorsed  
 in blank, and  
 afterwards in  
 full.

It will be seen from the foregoing paragraph that a bill which has been indorsed in full may afterwards be indorsed in blank; and that a bill which has been indorsed in blank may afterwards be indorsed in full. In the latter case it will be payable to bearer, as against the drawer, the payee, the acceptor, and the blank indorsers, in the same way as if it had never been indorsed

in full ; but, as against the special indorser, PART III.  
TIT. II.  
CAP. VI.  
title must be made through his indorsee.  
(See Byles, 137.)

Persons holding bills in auter droit should Indorse-  
ment in auter  
droit.  
be cautious lest they render themselves per-  
sonally liable, by indorsing, without using  
such special words as may prevent such  
liability. (Sm. Merc. Law, 232 ; Chit. B.  
142.)

An indorsement may be restrictive, that Restrictive  
indorse-  
ment.  
is, so worded as to deprive the instrument  
of negotiability : thus, ' Pay the contents to  
J. S. only,' or ' to J. S. for my use.' (Sm.  
Merc. Law, 230 ; Byles, 145 ; Chit. B. 164 ;  
Broom Com. 450.)

But though an indorsement be made in  
full to a person without the words ' or order,'  
he may nevertheless transfer by his indorse-  
ment. And yet, as we have seen, where the  
drawer or maker has, in the body of the  
instrument, made it payable to a particular  
individual, without adding words of transfer,  
such as ' or order,' it is not transferable.  
(Sm. Merc. Law, 231 ; Byles, 135, 137 ; Chit.  
B. 164 ; 2 Ste. Com. 114.)

The transfer may in general be made by Who may  
transfer.  
any holder, or his agent, or assignees in  
bankruptcy, or legal personal representative.

PART III. (Sm. Merc. Law, 232; Chit. B. 139, 141;  
 TIT. II.  
 CAP. VI. Byles, 160.)

— A person who has stolen or found a bill or note which is transferable only by indorsement, can convey no title to it. But a person who has stolen or found a bill or note transferable by mere delivery, may convey a title to it to a person acquiring it from him bonâ fide and for valuable consideration, but not if such person takes it, without sufficient caution, under suspicious circumstances, even though he have given its full value. (Sm. Merc. Law, 233; Chit. B. 178-9; Broom Com. 452, 139-40; Byles, 348.)

Rights of  
 bonâ fide  
 holder for  
 value.

Subject to this, however, a bonâ fide holder for value of a bill made payable to bearer or indorsed in blank, will not be affected by an intermediate fraud, nor bound to enquire whether the bill has been properly transferred or not. (Broom Com. 451; 2 Ste. Com. 121; Byles, 150-1.)

Time of  
 transfer.

The transfer of a bill by indorsement may be either before or after acceptance, and either before, or, to some extent and under certain qualifications, after maturity, that is, the time when it becomes due. But if the acceptor or maker pays a bill or note at maturity, it ceases to be a negotiable instru-

ment; no person remains liable on it, and consequently no person can sue on it; though, if an indorser pays a bill at maturity or after it is due, he may afterwards indorse or negotiate it. (Sm. Merc. Law, 233-5; Broom Com. 456-7; Byles, 157-8.)

PART III.  
TIT. II.  
CAP. VI.

He who takes a bill or note over-due, takes it subject to the equities, (if any) naturally arising out of the bill transaction, to which it was subject in the hands of the person from whom he received it; and he has no better title to it than the person from whom he takes it, if lost or stolen. (Sm. Merc. Law, 233, 272; Add. Torts, 204; Chit. B. 153; 2 Ste. Com. 114; Byles, 154-5.)

Position of a person who takes a bill or note over-due.

Delivery of the bill is necessary to perfect an indorsement. (Byles, 139.)

If a bill or note under 5*l.* is indorsed, the indorsement must be dated, and must specify the name and place of abode of the indorsee, and must be attested. (Byles, 160.)

Indorsement of bills or notes under 5*l.*

A bill of exchange payable to a third person operates as an undertaking, from the drawer to the payee and every subsequent holder fairly entitled to the possession, that the drawee, who is the person primarily liable, is competent to accept, i. e. to engage to pay it;

Operation of a bill.

PART III. and that he will, when requested, accept, and,  
 TIT. II.  
 CAP. VI. when due, pay it; and that if the drawee fail  
 — to do either, he, the drawer, will pay the  
 amount, provided he have due notice of the  
 dishonour. (Sm. Merc. Law, 207; Chit. B.  
 133-4; Broom Com. 436, 442-3; Byles, 3.)

Operation of  
 a note. A note operates as an undertaking, by the  
 maker to the payee and every subsequent  
 holder fairly entitled to the possession, that  
 he will make the payment therein specified.  
 (Sm. Merc. Law, 208; Broom Com.  
 469.)

Liability of  
 the parties  
 to a bill. Every person who indorses a bill or note  
 becomes a surety, and undertakes thereby,  
 to the indorsee and every subsequent holder,  
 that the bill or note shall be discharged by  
 the drawee or maker when it becomes due;  
 in fact, he is in many respects like the drawer  
 of a new bill, and is liable to succeeding  
 holders, in default of acceptance or payment  
 by the drawee or maker.

The acceptor is primarily and absolutely  
 liable upon the bill, even after indorsement;  
 the drawer and each indorser are only col-  
 laterally and conditionally liable to the holder,  
 in the event of the acceptor's or drawee's  
 making default, and of the holder presenting  
 the bill according to its tenor, and giving

due notice of the failure of the acceptor or drawee to pay upon a proper presentment. PART III.  
TIT. II.  
CAP. VI.

The transfer of a bill or note by mere delivery does not amount to such an undertaking on the part of the transferor. (Sm. Merc. Law, 235; Byles, 3, 139, 224; Chit. 170-1; Broom Com. 438-71; 2 Ste. Com. 117-8.)

The holder of an indorsed note must present it in the first instance to the maker for payment; but, on his failure to pay, the holder may resort to the indorsers. Each indorser, however, after the first, has the right of recourse against the persons whose names are anterior to his own; but the first indorser or original payee has no remedy, except against the maker himself. (2 Ste. Com. 124.) Liability of the parties to a note.

Every holder of a bill ought to present it in due time for acceptance, where necessary. (Broom Com. 438; Byles, 166.) The request by the holder to the drawee, to accept the bill, is called a presentment for acceptance. (Sm. Merc. Law, 236; Broom Com. 444; Byles, 168.) Presentment of a bill for acceptance.

As there is no drawee in a note, there can, of course, be no presentment for acceptance; but yet, when a note is payable at sight or within a certain time after sight, it must Presentment of a note.

**PART III.** be presented to the maker, in order that the  
**TIT. II.** time for making payment may be ascertained.  
**CAP. VI.**  
 — (Sm. Merc. Law, 236; Byles, 71.)

Where pre-  
 sentment for  
 acceptance is  
 necessary.

In general, the holder is not bound to present for acceptance. But if a bill is made payable at a specified period after sight or after demand, a presentment for acceptance is of course indispensable, in order to ascertain the period when the bill is to become due. And even where presentment for acceptance is not necessary, it is usual and prudent, since the holder, if he succeeds in obtaining the acceptance of the drawee, gains the additional security of the drawee, which is likely to render the bill more negotiable; and if he does not succeed, his remedy against the drawer and indorsers is accelerated; for he may sue them immediately. (Sm. Merc. Law, 246; Chit. B. 187; 2 Ste. Com. 118-9.)

Time for pre-  
 sentment.

Presentment for acceptance must be within a reasonable time, depending on the circumstances of the case. (Sm. Merc. Law, 247; Chit. B. 188; Byles, 166.)

Acceptance.

An acceptance of a bill is an engagement by the drawee to pay the bill, according to the tenor of the acceptance. (Sm. Merc. Law, 236, 238-9; Byles, 170.)

Writing and  
 signature ne-  
 cessary to an  
 acceptance.

An acceptance must be in writing on the

bill, and signed by the acceptor or by some one authorised by him. (Sm. Merc. Law, 238; Broom Com. 435, 444; Chit. B. 196; 2 Ste. Com. 115; Byles, 174-5.)

PART III.  
TIT. II.  
CAP. VI.

An acceptance may be either absolute (otherwise termed general) or qualified. An absolute acceptance is an engagement to pay according to the tenor of the bill; a qualified acceptance (which the holder is not bound to take) may be either conditional, to pay on a contingency, or partial, or varying from the tenor of the bill, as to amount, time, place, or mode of payment. (Sm. Merc. Law, 238-9; Broom Com. 444, 446; Chit. B. 198, 201-2; Byles, 177-9.)

Different  
kinds of ac-  
ceptance.

A bill may be either accepted simply, or accepted payable at a banker's. And a bill may be made payable at one place, and accepted payable at another place. If a person accepts a bill payable at the house of a banker or other place, without the expression of an intention that it should not be payable elsewhere, there, in an action against the acceptor, such acceptance shall be deemed a general acceptance; so that presentment at that place need not be averred or proved; and presentment for payment, either at the banker's or to the acceptor himself, will

Accepting  
payable at a  
banker's.



PART III. suffice. (Sm. Merc. Law, 245 ; Broom Com.  
 TIT. II.  
 CAP. VI. 446-7 ; 2 Ste. Com. 115-6 ; Byles, 180.)

What an acceptance admits.

He who accepts a bill thereby admits the drawer's capacity to make it, and, if he accepted after sight of the bill, he thereby admits the drawer's signature also ; but the acceptance does not admit the capacity or signature of an indorser. (Sm. Merc. Law, 239 ; Byles, 184-5.)

Acceptance for honour.

Sometimes, when the drawee cannot, will not, or does not accept, some other person accepts the bill, for the honour of some one of the parties. This acceptance for honour, as it is termed, if the holder chooses to take it, enures for the benefit of all the parties subsequent to him for whose honour it was made. Such an acceptance amounts to an undertaking to pay, if the drawee do not. And hence a bill so accepted must be presented to the drawee for payment when it falls due, even though he may have before refused ; and notice of the non-payment by him must be given to the acceptor for honour. Even though the acceptor for honour may have accepted without the knowledge of the party for whose honour he accepted, yet he has his remedy against such party and those whom that party might have sued, and

therefore against the drawee, if he has accepted. (Sm. Merc. Law, 240; Chit. B. 237-9, 243; Broom Com. 449, 450; 2 Ste. Com. 120; Byles, 243-7.)

PART III.  
TIT. II.  
CAP. VI.  
—

An acceptance for honour is generally, if not invariably, after a protest, and hence is often termed an acceptance *supra protest*. (Sm. Merc. Law, 241; Chit. B. 237; Byles, 243.)

Acceptance  
*supra protest*.

A bill may be accepted or indorsed by a person 'per proc.,' that is, per procuration; words which import that the acceptor or indorser is acting as agent under a special authority; and if he has no authority, or has exceeded his authority, the holder of the bill will have no redress against the principal or supposed principal. (Broom Com. 449; Byles, 30.)

Acceptance  
or indorse-  
ment per  
proc.

A presentment to the acceptor or maker for payment is not generally necessary in order to charge him, even in the case of a bill or note made payable on demand. But if a bill or note is payable at or after sight or at a particular place, presentment is necessary, even to charge the acceptor or maker. And a presentment to the acceptor or maker for payment is necessary in all cases where it is sought to charge the indorser or

Where pre-  
sentment for  
payment is  
necessary.

**PART III.** any party who might sue on it after paying it.  
**TIT. II.**  
**CAP. VI.** (Sm. Merc. Law, 242-3, 246; Byles, 199.)

—  
 To whom  
 presentment  
 for payment  
 should be  
 made.

It is not necessary to make a personal demand on the acceptor. It is sufficient to demand payment of the acceptor's wife or other agent, at his residence or place of business. Where a bill or note is made or accepted payable at a particular place, a presentment at all the banking-houses in that place will suffice. If the maker or drawee is dead, the presentment must be to his legal personal representative, or, if he have none, at his house. (Sm. Merc. Law, 244; Byles, 186, 188, 197.)

When presentment for payment must be made.

If a bill is payable on demand at a banker's in the place where it is received, it must be presented, during banking hours, not later than the day after it is received. If payable elsewhere, it must be forwarded by the regular post, not later than the day after it is received, or, in the case of a foreign bill, by the next ordinary conveyance; and it will suffice if the party receiving it by post presents it on the next day. (Sm. Merc. Law, 248-9; 2 Ste. Com. 117; Byles, 193, 195.)

Days of  
 grace.

Though a bill or note be expressed to be payable on or after a particular day, time, or event, yet it is not really payable

till the expiration of a certain number of days afterwards, called days of grace, which vary in number in different countries. In England, three days of grace are allowed, unless the third day is a day of public rest; in which case the bill is payable on the second day. Thus, a bill payable six days after sight would purport to be payable on the seventh, and must be presented on the tenth. But in the case of a bill or note expressed to be payable on demand or payable generally (which is, in effect, on demand), no days of grace are allowed. (Sm. Merc. Law, 249-51; Chit. B. 258-61; 2 Ste. Com. 115; Byles, 190-1, 195.)

A foreign bill is frequently drawn payable at one usance, or two or more usances. A usance is the period for payment which is customary between the places where the bills are drawn and payable. Thus, a usance between this country and Venice being three calendar months, and six days of grace being allowed, exclusive of days on which the bank is shut, a bill drawn on Venice at two usances, and dated the 1st of January, would be actually payable on the 7th of July, or, if a Sunday, holiday, or day on which the bank is shut, intervened, on the 8th of July.

PART III.  
TIT. II.  
CAP. VI.

Usances.

PART III. (Sm. Merc. Law, 251 ; Chit. B. 254 ; Byles,  
 TIT. II.  
 CAP. VI. 71, 189 ; Broom Com. 461.)

Consequence  
 of non-pre-  
 sentment in  
 due time.

The maker or acceptor will not be discharged by a non-presentment for payment on the very day when the bill or note becomes due ; because they are the parties originally and primarily liable. But the drawer, and all the indorsers, who are looked upon as sureties for the acceptor, will be discharged, if a presentment is not made upon the very day, or (except in the case of an accommodation bill) if proper notice of dishonour is not given, even though the drawer or indorsers may have knowledge of the fact. This rule would seem to depend on the principle that the enforcing the presentment for payment and the giving notice of dishonour in proper time, generally tends to give the drawer a better opportunity of withdrawing the effects of the drawer in the hands of the drawee, for which the bill is supposed to be drawn, and to give the indorsers a better opportunity of recovering the money, and to let them know that the holder does not intend to give credit to the acceptor. (Sm. Merc. Law, 248 ; Broom Com. 439-41 ; Chit. B. 244 ; 2 Ste. Com. 117 ; Byles, 199, 225.)

A cheque should in strictness be presented for payment the day after it is issued; but delay will not exonerate the drawer, unless the person on whom it was drawn has failed in the meantime, and the drawer would thus sustain a loss. (Sm. Merc. Law, 249; Byles, 18.)

When a bill or note is refused acceptance or payment, notice of such refusal, technically termed notice of dishonour, must at once be given by the holder or some other party to the bill or note, or by an agent who holds the bill, as a banker or attorney, and in the agent's own name, to the drawee, or to the indorser immediately preceding the party by or on whose behalf such notice is given, or to any one or more of the other prior indorsers, to whom he wishes to resort, or to the personal representative or assignees in bankruptcy of such party or parties. A notice enures to the benefit of all who stand between the person giving it and the person receiving it. (Sm. Merc. Law, 252-3; Chit. B. 186, 218, 302; Byles, 265; Broom Com. 438, 458; 3 Ste. Com. 117-8.)

A foreign bill dishonoured should, in general, be protested, and information of the protest sent with the notice of dishonour, if

PART III.  
TIT. II.  
CAP. VI.

Notice of  
dishonour.

Protesting or  
noting.

PART III. the drawer is abroad. Foreign promissory  
 TIT. II. notes need not be protested. Inland bills may  
 CAP. VI. be protested, but it is not necessary or usual :  
 — they are usually noted for non-payment, al-  
 though even that is unnecessary. (Sm. Merc.  
 Law, 258 ; Chit. B. 324 ; Byles, 237, 239,  
 240 ; Broom Com. 461 ; 2 Ste. Com. 119.)

A protest is a minute of the non-acceptance or non-payment, and of the reason, if any, assigned, accompanied by a solemn declaration, on the part of the holder, against any loss to be sustained thereby, and made out by a notary public. On the day of dishonour, the notary public again presents or causes it to be presented, and, if acceptance or payment is again refused, makes a minute thereof, which is called noting the bill, from which he afterwards draws up the protest. (Sm. Merc. Law, 258 ; Chit. B. 225 ; 2 Ste. Com. 119 ; Byles, 239.)

When notice  
 of dishonour  
 should be  
 given.

Notice must be given by the holder, to parties who reside in the place where the presentment was made, by the expiration of the day after the dishonour ; to parties who are not living in the same place, by the post of that day, or of the next post day, or, in the case of a foreign bill, by the next ordinary conveyance, after the day when the intelli-

gence of the dishonour was received. Each party, however, has a day for giving notice, or, under special circumstances, more than a day. And a banker with whom a bill is deposited to receive payment has a day to give notice to his customer, and the customer has another day to give notice to the antecedent parties. (Sm. Merc. Law, 259; Broom Com. 458-9; Byles, 261-3; 2 Ste. Com. 117.)

PART III.  
TIT. II.  
CAP. VI.

The notice may be either written or verbal, and if a written notice is despatched by the post, it is sufficient, though it be not received. (Sm. Merc. Law, 261; Chit. B. 229; Byles, 258, 261; Broom Com. 460.)

What  
amounts to  
notice.

If the holder fails to present a bill or note where necessary, or to give notice of dishonour, the drawer and indorsers will be discharged. (Sm. Merc. Law, 242-3, 246; Chit. B. 186, 244; Byles, 199, 254, 273; Broom Com. 438, 447, 470-1; 2 Ste. Com. 117.)

Consequence  
of not pre-  
senting or  
giving notice  
of dishonour.

The payment must be made to the true holder or his representatives. (Sm. Merc. Law, 264; Byles, 202.)

Payment.

The holder of a bill may enforce payment by action against the drawee, if he has accepted. If the bill has been dishonoured, by non-acceptance or non-payment, the holder may also enforce payment by action against

Against  
whom pay-  
ment may be  
enforced.



PART III. the drawer and the indorsers, if any, whose  
 TIT. II. names were on it when first it became the  
 CAP. VI. property of the holder; but not against any  
 — subsequent party. (Sm. Merc. Law, 266;  
 Chit. B. 262; 2 Ste. Com. 116; Byles, 139.)

Each indorser in turn who is called upon and obliged to pay, may have recourse to any indorser, prior to himself in order, who has had due notice of dishonour; or any indorser so obliged to pay may sue the drawer or acceptor, instead of any preceding indorser. (2 Ste. Com. 117-8; Add. Cont. 806; Chitty B. 170.)

The holder is not obliged to enforce his right against one party. He may separately sue, in distinct actions, all the parties, either contemporaneously or successively; but on payment of the bill and costs by one, proceedings against the others will be stayed. (Sm. Merc. Law, 266; Chit. B. 364; Byles, 379.) Anyone who discharges a bill thereby becomes a holder. (Sm. Merc. Law, 267.)

Amount re-  
coverable.

In general the holder may recover the sum expressed to be payable in the bill or note, with interest, if reserved, or if the jury choose to give it, and all expenses occasioned by non-acceptance or non-payment. (Sm. Merc. Law, 267; Chit. B. 431-3; Byles, 284.)

Whenever a bill of exchange, draft, or order, having thereon an adhesive stamp, is presented for payment, the person to whom the same is presented, must, under a penalty of 20*l.*, upon paying the same, write or impress, or cause to be written or impressed, upon every stamp affixed to the bill, the word 'paid,' to the end that the stamp may be made incapable of being used again. (23 & 24 Vic. c. 15, s. 12.)

PART III.  
TIT. II.  
CAP. VI.

Defacing  
stamp on  
payment.

The person who pays a bill or note has, generally speaking, a right to it as his voucher, if negotiable, but not otherwise. (Byles, 212; Sm. Merc. Law, 283; Broom Com. 485; 2 Ste. Com. 116; Add. Torts, 198.)

Delivering  
up a bill or  
note on pay-  
ment.

The holder may renew a bill or note, that is, he may take another bill or note in continuance of it, which will have the effect of suspending his right of action on the first bill or note till the substituted bill or note is at maturity. (Byles, 218, 230.)

Suspension  
by renewal.

A bill or note cannot be rendered conditional or qualified by a contemporaneous verbal agreement. (Sm. Merc. Law, 211; Byles, 90; Broom Com. 44-5; Chit. B. 93.) But a contemporaneous written agreement, on a distinct paper, to renew, or in other respects qualify the liability of the maker or acceptor,

Adding a  
condition or  
qualification.

PART III is good, as between the original parties and  
TIT. II their representatives, but not as against third  
CAP. VI persons who have no notice of it. (Byles, 89 ;  
Chit. B. 92 ; Broom Com. 444.)

A verbal promise to renew, founded on valuable consideration, and made after a bill or note has been given or indorsed, will be binding. (Chit. B. 94.) But such a promise will not be binding if contemporaneous with the drawing of the bill or note, or, when made to an indorser, contemporaneous with his indorsement ; because that would be to incorporate with the written contract an incongruous parol condition. (Sm. Merc. Law, 276 ; Chit. B. 94.)

A contemporaneous indorsement, purporting to render a bill or note payable only on certain conditions, will convert it from a negotiable instrument into an agreement, as between the parties to it. (Sm. Merc. Law, 211.)

Alteration. Any material alteration of a bill or note after it has been issued, unless satisfactorily accounted for, invalidates it as against parties not consenting to the alteration. And even though the alteration be made by consent, the instrument is a new contract, requiring a new stamp, unless such alteration was

made to correct a mistake, and render the bill or note what it was originally intended to be. (Sm. Merc. Law, 278; Chit. B. 127-8; Byles, 299-301.)

PART III.  
TIT. II.  
CAP. VI.

If the plaintiff obtains from the defendant a security of a higher description, as for instance a judgment upon it, the defendant's liability will be extinguished; but until satisfaction of the debt, the holder may proceed on the bill or note against any other distinct party to it not jointly liable with the original defendant. (Sm. Merc. Law, 276; Byles, 217.)

Extinguish-  
ment.

All parties subsequent to the person by whom a bill or note is satisfied, and all prior parties for his accommodation, are released by such satisfaction. (Sm. Merc. Law, 277.)

Satisfaction.

An acceptance or note may be discharged without any satisfaction.

If a creditor discharges the principal debtor, or binds himself to give him time, however short, the sureties are discharged. The maker or acceptor of a bill or note is considered the principal, and the indorsers his sureties; and consequently, if the holder either discharges or effectually binds himself to suspend his remedy against the maker

Discharge.

PART III. or acceptor, the indorsers are discharged  
 TIT. II. thereby, unless they have previously consented  
 CAP. VI. to it, or waived their right of discharge by a  
 — subsequent promise to pay, with knowledge  
 of it, or unless it was agreed at the time be-  
 tween the holder and the maker or acceptor  
 that the surety should not be discharged.

And a subsequent indorser is regarded as  
 a surety for the prior one; and therefore, if  
 the holder discharges, or effectually binds  
 himself to give time to, a prior indorser, he  
 discharges the subsequent indorsers.

The mere giving time, or even a verbal  
 promise not to press or not to sue, without  
 any binding contract not to do so, will not  
 discharge those who stand in the position of  
 sureties. (Sm. Merc. Law, 280-1; Chit. B.  
 286-9; Byles, 224-5, 233-4.)

The holder's discharge of one joint maker  
 of a note operates as a discharge of the  
 other. (Sm. Merc. Law, 283; Chit. B. 289.)

Discounting,  
 receiving, or  
 cashing a  
 bill or note  
 or negotiable  
 security.

The owner of a bill, note, or negotiable  
 security, may recover it from one who dis-  
 counts it, or changes it, or receives it by way  
 of deposit, having reason to suspect that the  
 person from whom he received it was not  
 the owner of it. (Add. Torts, 190, 203;  
 Byles, 150.)

If a person finds a bank-note, or discounts PART III.  
 or cashes a bank-note for a person who (as TIT. II.  
 he knows) found it, he may be compelled by CAP. VI.  
 the owner to restore it. But if the finder  
 transfers a lost bill or note which may pass  
 by mere delivery, the transferee who takes  
 it without fraud may retain it against the  
 owner, and sue the parties liable thereon.  
 (Add. Torts, 203; Byles, 327.) And if the  
 finder of a bank-note pays it away, bonâ  
 fide, in the ordinary course of business,  
 before the owner demands it, he has no  
 remedy. (Add. Torts, 203; Broom Com.  
 437.)

If a banker pays a forged cheque, he must Payment of a  
 forged or  
 altered  
 cheque.  
 bear the loss himself; and if he pays a  
 cheque which has been fraudulently altered  
 in amount, he will have to suffer, unless the  
 drawer has, by his gross fault, facilitated  
 the commission of the fraud. (Broom Com.  
 455; Chit. B. 348.)

A forged indorsement confers no title to a Forged in-  
 dorsement  
 bill. (Add. Torts. 203; Byles, 311.)

If a banker pays a bill bearing a forged  
 indorsement, he, and not his customer, will  
 suffer. (Broom Com. 453.)

But any draft or order drawn upon a banker,  
 for a sum payable to order on demand, which,

**PART III.** when presented for payment, purports to be  
**TIT. II.**  
**CAP. VI.** indorsed by the person to whom the same is  
 drawn payable, is a sufficient authority to the  
 banker to pay the amount to the bearer. (16  
 & 17 Vic. c. 59, s. 19; Grant, 27.)

**Loss of  
 notes, bills,  
 &c.**

If a note or bill, payable to bearer, is lost, immediate notice should be given to the parties who are liable on it, and notice should also be given at once to the public by advertisement. After notice, the owner may recover its value from a person who received it without a reasonable degree of caution. And even if it is not duly advertised, still the loser may recover its value from any holder who has taken it under suspicious circumstances. (Add. Torts, 191; Byles, 349.)

In the case of an action founded upon a bill of exchange or other negotiable instrument, the Court or Judge may order that the loss of the instrument shall not be set up, provided an indemnity is given against the claim of any other person upon such negotiable instrument. (Sm. Merc. Law, 286; Chit. B. 185; Broom Com. 486; 17 & 18 Vic. c. 125, s. 87.)

**Crossed  
 cheques.**

If a cheque or draft on any banker, payable to bearer or to order on demand, is issued, crossed with the name of a banker,

or with two transverse lines, with the words 'and Company,' or any abbreviation thereof, the banker on whom it is drawn may not pay it except to the banker with whose name it is crossed, or if it is crossed without a banker's name, then to any other than a banker. And any holder may, if it is thus crossed without the name of a banker, or is not crossed at all, cross a cheque with the name of a banker, or with the words 'and Company,' &c., and then it is only to be paid to the banker whose name it bears, or, if none be named, to some banker. The obliteration, adding to, or altering of, a crossing of a cheque, is a felony. But in order to protect the banker, if, when it is presented for payment, the cheque does not plainly appear to have been crossed or obliterated, &c., he incurs no responsibility by paying it, unless he act *malâ fide*, or be guilty of negligence. (Sm. Merc. Law, 264; 21, 22 Vic. c. 79.)

Promissory notes for less than 5*l.*, payable on demand to bearer, are prohibited under a penalty; and so are all negotiable bills, notes, and undertakings for less than 20*s.*; and negotiable bills or notes for more than 20*s.* and less than 5*l.* (except cheques

PART III.  
TIT. II.  
CAP. VI.

Bills and  
notes under  
5*l.*



PART III.  
TIT. II.  
CAP. VI. on bankers) are also void, unless they specify the name and abode of the payee, are attested by a subscribing witness, bear date at or before the time of issue, and are made payable within twenty-one days after date, but not to bearer on demand; and such instruments cannot be negotiated after the time limited for their payment. (Sm. Merc. Law, 213; 2 Ste. Com. 124; Byles, 75, 76; Chit. B. 101.)

## CHAPTER VII.

## DEBTORS AND CREDITORS GENERALLY.

A DEBT is a sum due.

PART III.

TIT. II.

CAP. VII.

It is not essential to the existence of a debt, generally, that any valuable consideration should have moved from the creditor.

Debt defined.  
Consideration.

(Trower, 2.)

Debts, when classified according to the mode in which they are evidenced, are of three kinds: judgment debts, specialty debts, and simple contract debts. (Trower, 2.)

Division of  
debts.

A judgment debt is a sum payable under a judgment, decree, order, or rule, either made by a superior court of common law or of equity, or having the same effect as if so made. (See Trower, 5-6).

Judgment  
debt.

Statutes and recognisances are now dis- used.

Statutes and  
recogni-  
sances.

It is enacted by the Statute of Westminster 2, 13 Edw. I. c. 18, that when a debt is recovered or acknowledged, or damages ad-

Elegit.

PART III. judged in the King's Courts, the plaintiff  
 TIT. II.  
 CAP. VII. shall have his election either to have a writ

of fieri facias, or else that the sheriff shall deliver to him all the chattels of the debtor, (saving only his oxen and beasts of the plough), and also one half of his lands, until the debt shall be levied upon a reasonable price or extent: the word 'price' referring to the chattels, and the word 'extent' to the lands. In consequence of this statute, a writ was framed, under which the sheriff first causes the goods and chattels to be appraised by a jury; and if they are insufficient to pay the debt, then the jury put an annual value on the lands, and the sheriff delivers the goods and chattels and a moiety of the land to the creditor under the old law, or the whole under the statute 1 & 2 Vic. c. 110, s. 11. This writ was called a writ of elegit, because the creditor thereby elected to sue out execution against the lands, instead of proceeding at common law against the goods alone by writ of fieri facias.

Warrant of  
 attorney to  
 confess  
 judgment.

In consequence of the word 'acknowledge' in the Statute of Westminster 2, it has become a common practice, when money is borrowed, for the debtor not only to execute a bond to the creditor, but also a warrant of

attorney, addressed to two or more attornies, PART III.  
TIT. II.  
CAP. VII.  
authorising them to acknowledge a judgment for the money, which enables the creditor to sue out a writ of elegit as effectually as if the judgment had been obtained in an adversary suit.

Under the statute 1 & 2 Vic. c. 110, s. 13, a Operation of  
a judgment  
as a charge.  
judgment also operates as a charge upon the landed property which the debtor has or afterwards acquires, or of which he has an absolute disposing power exercisable for his own benefit; though the benefit of the charge cannot be obtained until after the expiration of one year from the time of entering up the judgment. But a purchaser, mortgagee, or creditor of or from the debtor is not bound even by judgments of which he had notice, unless they are registered within five years before the conveyance or mortgage, or before the accrual of the creditor's right. And so far as regards the extended remedies of the stat. 1 & 2 Vic. c. 110, he is not bound by judgments of which he had no notice, though they are registered. So that, as regards purchasers, mortgagees, and creditors, in order to subject them to the extended remedies of the stat. 1 & 2 Vic. c. 110, both notice and registration are necessary; but in order to subject them

PART III. merely to the old remedies prior to the stat.  
 TIT. II. 1 & 2 Vic. c. 110, registration will suffice  
 CAP. VII.

— without notice, although notice will not suffice without registration. But it is further to be observed that, by the stat. 23 & 24 Vic. c. 38, s. 1, no judgment, statute, or recognisance entered up after the 23rd of July, 1860, will affect any land, as to a bonâ fide purchaser for valuable consideration, or a mortgagee, even with notice, unless a writ or other due process of execution shall have been issued and registered before the execution of conveyance or mortgage and the payment of the purchase or mortgage money, nor unless such process shall be executed and put in force within three calendar months from the time when it was registered.

Elegit after  
 a fieri facias.

If the creditor first sues out a writ of fieri facias against the debtor's goods, and they are insufficient to satisfy the debt, he may take out an elegit against his lands for the remainder of the debt. And this is the best course.

Decrees,  
 rules, and  
 orders, to  
 have effect of  
 judgments.

All decrees and orders of Courts of Equity, and all rules of Courts of Common Law, and all orders in matters of bankruptcy and lunacy, whereby any sum of money, or any costs, charges, or expenses, is or are payable, have

the effect of judgments in the superior Courts of Common Law. PART III.  
TIT. II.  
CAP. VII.

A judge of one of the superior Courts of Common Law may order that any stock, funds, or shares, or the income thereof, belonging to a judgment debtor, shall stand charged with the debt; and such order has the effect of a charge. (See, on the subject of judgments, Sm. Law of Prop. part ii. tit. 10, c. 3.) Charging orders.

A specialty debt is a debt resulting from an instrument sealed and delivered. (Trower, 139.) Specialty debt.

A simple contract debt is a debt not secured by deed or evidenced by record. (Trower, 167.) Simple contract debt.

A contract of debt is one whereby a definite sum of money becomes due to any person. (Sm. Merc. Law, 537; Trower, 1, 2.) Contract of debt.

Accounts are divisible into open, stated, and settled accounts. Division of accounts.

An open account is an account of which the balance is not struck, or which is not accepted by both parties. Open accounts.

A stated account is one that is accepted by both parties. This acceptance need not be expressed, but may be implied from circumstances; as, if no objection is made to the Stated accounts.

PART III. account within a reasonable time. What is  
 TIT. II. a reasonable time, is to be determined by the  
 CAP. VII. habit of business; and the usual course is  
 — required to be followed, unless there are  
 special circumstances constituting a ground  
 for variation. Between merchants, acquies-  
 cence is presumed, under ordinary circum-  
 stances, after a lapse of several posts. (Sm.  
 Manual, 235.)

Where inter-  
 est is pay-  
 able.

Interest may be demanded, not only where  
 there is an express stipulation for it, but also  
 where it is payable by the usage of trade or  
 of the parties, or in the case of an overdue  
 bond, bill, or promissory note. And the jury  
 may allow interest to the creditor, on any  
 debt or sum certain, from the time when the  
 same was payable, if payable from a time  
 certain under a written instrument, or, if  
 payable afterwards, from the time of making  
 demand, with notice that interest would be  
 claimed. Interest at 4 per cent. is payable on  
 a judgment debt. (Sm. Merc. Law, 545-7;  
 Trower, 78, 205-7, 304.)

Rate of in-  
 terest.

Until a recent act, a higher rate of interest  
 than 5 per cent. yearly was not permitted in  
 any case to which the law against usury  
 applied. That law, however, did not apply  
 where the right to recover the money lent

was, by the terms of the loan, put in jeopardy; PART III.  
TIT. II.  
CAP. VII.  
as in the case of bottomry or respondentia, and of annuities for lives. And by a recent act (17 & 18 Vic. c. 90), the laws against usury were repealed, so far as they do not affect pawnbrokers. (2 Ste. Com. 90-1, 95.)

Compound interest is interest upon interest, i.e. interest on a balance of account in which the debtor is debited with former interest. This is allowable where it is expressly stipulated, or where there is an implied contract for it; as where the parties had been in the habit of dealing on the footing of allowing it, or where it is the practice of a banking-house, of which the customer was aware. (Sm. Merc. Law, 547; 2 Ste. Com. 96.) Compound interest.

The debtor is bound to tender the principal and interest at the proper time, without waiting for a demand. (Trower, 211.) Tender.

Bank of England notes, payable to bearer on demand, are a legal tender for any sum above 5*l.*, except when the tender is made by the Bank itself, or its branches, as the debtor. Country notes are not a legal tender, if objected to on that ground. (Sm. Merc. Law, 539; Trower, 211.)

A conditional tender, or the tender of



**PART III.** a sum exceeding the debt, and requiring  
**TIT. II.** change, is not a legal tender, that is, not  
**CAP. VII.** — a tender which the creditor is bound to  
 accept. (Sm. Merc. Law, 540 ; Trower,  
 211-2.)

**Payment by  
 bill or note.**

When a creditor accepts a bill or note in payment, he thereby virtually agrees to give the debtor credit for the time which it has to run, except in the case of specialty debts. In general, it is no satisfaction of the debt or demand, until it is paid, unless the creditor agrees to accept it as cash. (Sm. Merc. Law, 541-2 ; Roscoe on Evid. 472-3.)

**Proof of  
 payment or  
 non-payment**

Although a receipt was given, the debtor may prove payment by oral testimony ; or the creditor may prove that in reality no payment was made. (Trower, 212.)

**Stamps on  
 receipts.**

All receipts for 2*l.* and upwards now require a penny stamp, and no more. The stamp cannot be added after they have been written, except within fourteen days on payment of the duty and 5*l.*, or one calendar month on payment of the duty and 10*l.* (Sm. Merc. Law, 552 ; Trower, 212.)

**Connected  
 accounts.**

In the case of connected accounts of debts and credits, the balance only is recoverable, whether at law or in equity. (Sm. Manual, 323.)

The general law as to the appropriation of payments is this: the debtor is entitled to apply the payments, at the time of making them, in such manner as he thinks fit. In default of appropriation by the debtor, the creditor is entitled to determine the application of the sums paid. And if neither does so, the law implies an appropriation of such payments to the earlier debt or earlier items of debt. (*Merriman v. Ward*, 1 John. & Hem. 376; Story's Eq. Jur. § 459a-459g; Trower, 212; Roscoe on Evid. 471-2; Tudor Ca. on M. L. 17, 20, 23-4.)

PART III.  
TIT. II.  
CAP. VII.  
—  
Appropriation of payment.

A guaranty is a promise to be responsible for the payment of a debt or the performance of a duty, in case another person, who is primarily liable to such payment or performances, fails to pay or perform the same. (Wharton's Law Lexicon; Sm. Merc. Law, 463; 2 Ste. Com. 103; Roscoe on Evid. 329.)

Guaranty defined.

Where A. has induced a tradesman to deliver goods to B., the question frequently arises, whether the goods were actually sold to A., though delivered to B., or whether they were sold to B., and A. only became surety for the price. (Sm. Merc. Law, 468; Roscoe on Evid. 329-30.)

One person inducing a tradesman to supply goods to another person.

**PART III.** In consequence of the 4th section of the  
**TIT. II.** Statute of Frauds, no action can be brought  
**CAP. VII.** to charge the defendant upon any special  
Enactments  
of the Statute  
of Frauds as  
to guaran-  
ties. promise to answer for the debt, default, or  
miscarriage of another person, unless the  
agreement upon which such action is brought,  
or some memorandum or note thereof, is in  
writing, signed by the party to be charged  
therewith, or some other person lawfully  
authorised by him. (Sm. Merc. Law, 463 ;  
2 Ste. Com. 103.) The writing, however, is  
only necessary by way of proof of the con-  
tract, not to constitute it. (Sm. Merc. Law,  
472 ; 1 Sm. L. C. 272.) And the statute does  
not apply where an order for goods is given  
by, and credit given to, one person for the use  
of another ; for the debt in that case is the  
debt of the person giving the order. The  
statute only applies to promises to answer  
for the debt, default, or miscarriage of  
another, for which that other person himself  
is liable. And hence, if A. says, 'Let B.  
have these articles, and if he do not pay, I  
will,' the statute applies ; so that a writing is  
required. But if A. had said, 'Let B. have  
these articles on my account,' or 'Let B.  
have these articles, and charge me with them,'

no writing would be required; because B. would not be liable at all, inasmuch as the articles were in fact purchased by A., though delivered by his direction to B. (Sm. Cont. 84-5; Broom Com. 382.)

PART III.  
TIT. II.  
CAP. VII.  
—

The statute does not apply to a case where the result of a promise to pay the debt or perform the duty of another is to extinguish or satisfy the liability of such other person, by substituting the former in his stead; as if A. agree to pay B.'s debt to C., if C. will discharge B. from arrest under a *ca. sa.* (Roscoe on Evid. 330.)

The statute does not apply to promises not made to the person to whom the original debtor is liable: so that, if made to the debtor or to a third person, the promise need not be in writing. (Sm. Cont. 89; Broom Com. 383; 1 Sm. L. C. 264.)

But the statute applies to promises to answer for another's default or miscarriage, though it be a tort unconnected with breach of contract. (Broom Com. 384.)

In consequence of the statute 19 & 20 Vic. c. 97, s. 3, it is no longer necessary that the consideration for a guaranty should appear in or by inference from a written

Consideration for a guaranty.

PART III. document. (Sm. Cont. 89, 90; Broom Com.  
TIT. II. 381; 2 Ste. Com. 103-4.)  
CAP. VII.

— If required by the opposite party, the person asserting a claim under a guaranty must show a good legal consideration for it. But it need not be shown that there was an adequate consideration. (Sm. Merc. Law, 470; Add. Cont. 567. As to what constitutes a consideration, see p. 38, supra.)

Misrepresentation practised on a surety.

Entire good faith is required between a debtor, creditor, and sureties. And if the surety or person giving the guaranty is misled, to the knowledge of the person receiving it, by a material misrepresentation or concealment of the terms of the contract, the suretyship or guaranty is ineffectual.

Discharge of a surety.

The surety or person giving the guaranty is discharged, if the principal debtor is released by the creditor, or if the debt or demand is by any means extinguished as between the principal parties. (2 Ste. Com. 104; Add. Cont. 579, 581; Burge, 163.)

Reimbursement of a surety.

The principal debtor is bound to reimburse the surety for any payment which he is compelled to make as surety. (2 Ste. Com. 105.)

Lord Tenterden's Act, as to representations or assurances, 9 Geo. IV. c. 10,

No action can be brought to charge any person, by reason of any representation or assurance as to the character, conduct, credit,

ability, trade, or dealing of any other person, that he may obtain credit, money, or goods, unless it be in writing signed by the party to be charged therewith. (Sm. Merc. Law, 481.)

PART III.  
TIT. II.  
CAP. VII.

Where there are mutual debts between the plaintiff and defendant, or, if either party be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt, if of definite amount, and in the same right, and recoverable by action by the party pleading it, may be set off against the other. (Add. Cont. 988-94; Selw. N. P. 166-9; Rosc. Evid. 475, 477-8.)

## CHAPTER VIII.

## SHIPOWNERS AND CHARTERERS.\*

**PART III.** WITH the exception of certain small coasting  
**TIT. II.** vessels, ships must be registered in order to  
**CAP. VIII.** have the privileges of British ships, i.e. the  
 right to assume the national flag and  
 character, and the right to the protection  
 that it affords. (Sm. Merc. Law, 182-3, 189;  
 3 Ste. Com. 249.)

**Shares in a  
 ship, and  
 number of  
 registered  
 shareholders.**

The property of every British vessel is to be considered as divided into sixty-four equal parts or shares; and no person can be registered as owner in respect of a fractional part of a share or any proportion not being a sixty-fourth part.

Not more than thirty-two individuals are entitled to register at the same time as legal owners in severalty of distinct shares of a ship. But any number of persons, not exceeding five, may register as joint owners of the ship or any share in her; and these joint owners, whether entitled by purchase or transmission, are to be considered as constituting one person in reckoning the number

\* The statute which consolidated the Acts relating to Merchant Shipping, is the 17 & 18 Vic. c. 104. This was amended by the stat. 18 & 19 Vic. c. 91, and 25 & 26 Vic. c. 63.

of persons entitled to be registered, and they cannot dispose in severalty of their respective proportions of their joint property. PART III.  
TIT. II.  
CAP. VIII.

Still, these rules do not affect the equitable or beneficial title of persons represented by or claiming through any registered owner; but no notice of a trust can be entered on the register. (Sm. Merc. Law, 191-2; 3 Ste. Com. 250; Mau. & Pol. 7, 8, 32.)

A registered ship or shares therein can only be transferred by bill of sale, in a prescribed form, under seal, executed in the presence of and attested by at least one witness, and registered. The name of the transferee, as owner, must be registered, and the date and hour of the entry must be indorsed on the bill of sale. (Sm. Merc. Law, 193-6; Mau. & Pol. 20-2.) Mode of transfer.

The registrar may grant to the owners of a ship a certificate of sale, authorising persons specified in it to dispose of it by sale out of the United Kingdom. (Sm. Merc. Law, 194; Mau. & Pol. 26.) Certificate of sale.

A mortgage or transfer of a mortgage of a British ship or any share in her must be in a specified form, under seal, and attested, and registered; and the date and hour of its entry must be indorsed upon it. Mortgaged.



PART III. In case more than one mortgage of the  
TIT. II.  
CAP. VIII. same ship or share is registered, the mort-

— gagees, notwithstanding any notice, have priority according to the date of registration. Every registered mortgagee may dispose of the ship or share mortgaged; but no subsequent mortgagee may do this, except under the order of some competent Court, without the concurrence of every prior registered mortgagee. (Sm. Merc. Law, 195; Mau. & Pol. 33-5.)

Certificate of mortgage. A certificate of mortgage may be granted by the registrar to the owners of a ship, allowing a mortgage out of the country where the ship is registered. And the mortgage, when made, is to be indorsed, by a registrar or British consular officer, on the certificate of mortgage. (Sm. Merc. Law, 196; Mau. & Pol. 36.)

Transmission of mortgage. The transmission of a mortgage, by death, bankruptcy, marriage, &c., must be registered. (Sm. Merc. Law, 196; Mau. & Pol. 35.)

Discharge of mortgage. When a mortgage is discharged, satisfaction is to be entered on the registry. (Sm. Merc. Law, 196; Mau. & Pol. 37.)

Charter party. A charter-party is a contract by which an entire ship or principal part thereof is let to a merchant, for the conveyance of goods therein by the shipowner, in considera-

tion of the payment of a sum of money. PART III.  
TIT. II.  
CAP. VIII.  
It is often, but not necessarily, a deed, and is executed by the owner of the ship or the master, or some other agent of the owner. (Sm. Merc. Law, 299, 300; 2 Ste. Com. 137-8; Mau. & Pol. 204.)

The sum paid for the hire of the ship is Meaning of  
freight. calculated at so much per ton or per month, and is called the freight; but that term is also used to denote the cargo. (2 Ste. Com. 137; Maclachlan, 381.)

The merchant who ships the goods is called Shipper,  
charterer,  
freighter,  
owner. the shipper, charterer, or freighter, and the ship is said to be freighted by him. The owner usually signifies the shipowner, not the owner of the goods. (See Sm. Merc. Law, 326-7; 2 Ste. Com. 137.)

The merchant usually covenants to load Demurrage. and unload within a specified number of days, which are called lay or running days, or to pay a daily sum for any longer time during which he may detain the ship. This sum, as well as the delay itself, is called demurrage; and it is payable even if the delay in loading or unloading was unavoidable, owing to the state of the weather or some other cause over which the freighter had no control. (Sm. Merc. Law, 301; Mau. & Pol. 264-5.)

PART III. A contract for conveyance in a general  
 TIT. II.  
 CAP. VIII. ship is a contract by which the master or  
 owner of a ship engages with separate  
 merchants, or with one merchant who sub-  
 lets her to sub-freighters, to convey their  
 goods to the place of her destination. In  
 this case, she is called a general ship; and  
 no charter is usually executed, but only a bill  
 of lading, which is a document that specifies  
 the ship and the goods shipped, and expresses  
 that they shall be delivered at a certain place,  
 in good order, on payment of a certain freight,  
 with primage and average. (See Sm. Merc.  
 Law, 305, 307; 2 Ste. Com. 137; Mau.  
 & Pol. 224-5.)

Conveyance  
 in a general  
 ship.

Bill of lad-  
 ing.

The usual course is for the master to give a receipt to the shipper on delivery of the goods on board, and afterwards to sign and deliver a bill of lading to the holder of the receipt, which is then returned to the master. And the merchant sends a copy or two copies of the bill of lading to the consignee, and retains one for his own use. But as between the shipper and the shipowner, it is not conclusive. (Sm. Merc. Law, 306, 315; Mau. & Pol. 90.)

The bill of lading is usually made out for delivery to a particular person or his

assigns; but sometimes it is made out for delivery 'to — order or — assigns.' PART III.  
TIT. II.  
CAP. VIII.  
Primâ facie, especially when the consignor is an unpaid vendor, the latter form indicates that he intends to reserve to himself the ownership of the goods, and the right of passing it by indorsing the bill of lading. (Sm. Merc. Law, 307-8.)

A bill of lading is a negotiable instrument; so that, by an indorsement of it by the shipper or consignee, either to a particular person or in blank, accompanied by a delivery of it to the intended transferee, the property in the goods may be transferred. (Mau. & Pol. 226, 274.) Indeed, though the consignee named in the bill of lading becomes insolvent without having paid for the goods, yet, if he assigns them for valuable consideration, and the assignee has no notice of the insolvency of the consignee, the ownership of the goods passes to the assignee. And the shipper retains this power of transferring the property in the goods by an assignment of the bill of lading, so long as they are in the hands of any agent of his. And the indorsement is not irrevocable as soon as made; for he may change his purpose before the delivery of the goods or of the bill of

PART III. lading to the person who is named in it.  
 TTT. II.  
 CAP. VIII. (Sm. Merc. Law, 309-10; Mau. & Pol. 262,  
 — 274.)

Power to  
 hypothecate  
 or sell the  
 ship.

The master may sell the ship, or a part or even the whole of the cargo, for the benefit of the owners, in cases of urgent necessity. (Mau. & Pol. 695-6; Tudor Ca. on M. L. 66-8.)

Where it is necessary to raise money for repairs, the master should endeavour to raise it on the credit of the owner; but if he cannot, he may hypothecate the ship or the freight; or, in case he cannot raise the money in any other way, he may sell the ship or a part or the whole of the cargo. If he hypothecates the cargo, the shipowner must indemnify the merchant. If he sells it, the merchant, on the ship's safe arrival at the place of destination, may elect to receive what the goods would have fetched if brought thither, or to take the sum realised by them. (Sm. Merc. Law, 314, 421; Mau. & Pol. 395-7.)

Responsibility of shipowner.

A shipowner is not liable for any loss or damage, happening without his actual fault or privity, of any goods, by reason of fire, or of any gold, silver, diamonds, watches, or precious stones, by reason of any robbery or embezzlement, unless the owner or shipper has inserted in the bill of lading, or declared

in writing to the master or shipowner, the nature and value of such articles. (Sm. Merc. Law, 319-20; Mau. & Pol. 48.)

PART III.  
TIT. II.  
CAP. VIII.

Nor are shipowners answerable in damages, in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage, where such loss or damage arises without their actual fault or privity. (25 & 26 Vic. c. 63, s. 54.)

A merchant who has taken a ship to freight or the consignee must pay the charges due on his commodities. These are usually primage, average, demurrage, and freight. Primage is a small payment to the master for his trouble. Average denotes several petty charges, such as towage, beaconage, &c. Demurrage and freight have been already spoken of. (Sm. Merc. Law, 320-3; Mau. & Pol. 28; see *supra*, 197.)

Charges payable by merchant or consignee.

Salvage is a compensation to be made by

Salvage.

PART III. the shipowner or merchant for some special  
TIT. II. assistance by which the ship or its lading has  
CAP. VIII. been saved from some impending peril, or  
— recovered after actual loss. (Sm. Merc. Law,  
334; Mau. & Pol. 420.)

General  
average.

General average is a contribution which the law requires to be made by the several persons interested in a ship, freight, and cargo, to indemnify a person suffering a damage, loss, or expense, which was voluntarily and necessarily incurred for the purpose of, and conduced to, the saving the ship and cargo or a part of the property; as where goods are thrown overboard or masts are cut away in order to lighten a ship. (See Sm. Merc. Law, 331-2; Sm. Manual, 313; 2 Ste. Com. 132; Mau. & Pol. 278-85.)

The practice is, to ascertain the proportion that the value of the property sacrificed bears to the entire value of the ship, cargo, and freight, and to make the property of each owner (including the property sacrificed) contribute to the common loss in that proportion. The adjustment of the average is usually made by brokers, and the amount is paid by the insurers of the different parties chargeable. (2 Ste. Com. 133; Sm. Merc. Law, 332; Mau. & Pol. 286.)

Bottomry (so called, because it is in the nature of a mortgage of the bottom or keel of a ship, a part for the whole) is an agreement entered into by the owner of a ship or his agent, whereby, in consideration of a loan for the use of the ship, the borrower undertakes to repay the loan, with interest, in the event of the ship terminating her voyage safely, and binds or hypothecates the ship, freight, or cargo, or all of them, for the performance of his contract. This agreement is usually in the form of a bond, called a bottomry bond, but sometimes in the shape of a deed poll, and is then called a bottomry bill. If the ship returns, the same, as well as the owner personally, becomes answerable for the money lent; but if the ship is lost, the lender loses his money. (Sm. Merc. Law, 419; 2 Ste. Com. 91; Mau. & Pol. 385.)

PART III.  
TIT. II.  
CAP. VIII.  
Bottomry  
and respon-  
dentia.

Where the loan was not on the vessel, but on the cargo, it used to be called *respondentia*, because, in that case, only the borrower personally is bound to answer the contract. Such a person is said to take up money at *respondentia*. (Sm. Merc. Law, 419; 2 Ste. Com. 91; Mau. & Pol. 385.)

But the term *respondentia* is now seldom



PART III. used; the term bottomry being employed,  
 TIT. II.  
 CAP. VIII. even where the cargo alone is the security.

— The terms bottomry and respondentia are also applied to contracts for the repayment of money borrowed on the mere hazard of the voyage. (2 Ste. Com. 91; Mau. & Pol. 385; Maclachlan, 46.)

Interest. The lender's principal being at hazard during the voyage, he was entitled to stipulate for any amount of interest whatever, even when the usury laws were in force. (Sm. Merc. Law, 420; Mau. & Pol. 392.)

Effect of hypothecation. Although a bottomry bond purports to assign the ship, or freight, or goods, the effect of it is not to give the creditor a property in that which is so assigned, but to give him a claim upon it, enforceable by legal process. (Sm. Merc. Law, 422; Mau. & Pol. 392.)

Order of payment of loans. If securities of this kind are given at different periods of the voyage, and the value of the property is insufficient to discharge them all, the last in point of date is entitled to priority of payment, if the master was unable to obtain the necessary supplies on the personal credit of himself or his employers; because, without the last loan, the former lenders might have entirely lost their security. (Sm. Merc. Law, 424; Abbott, 133.)

## CHAPTER IX.

## INSURERS AND INSURED.

I. *Insurance generally.*

INSURANCE is a contract by which a person, in consideration of a gross sum or of a periodical payment, undertakes to pay a larger sum on the happening of a particular event.

PART III.  
TIT. II.  
CAP. IX.  
—  
Definition of  
insurance.

The consideration is termed the premium or premiums; the party entering into the undertaking, the assurer or insurer; the party for whose benefit it is entered into, the assured or insured; the happening of the event, the risk; and the instrument containing the contract, the policy. The interest which it is necessary for a person to have before he can effect an available insurance on his own account and for his own benefit, is called an insurable interest; and the interest of the assured is said to be covered by the policy, when the amount payable under the policy would fully compensate

Explanation  
of the terms  
in use.

PART III. him for any loss his interest may sustain.  
 TIT. II.  
 CAP. IX. (See Sm. Merc. Law, 339; 2 Ste. Com. 125;  
 — Bunyon, 1, 6, 9; Arnould, 2, 3.)

Fraud, mis-  
 representa-  
 tion, or con-  
 cealment.

The law requires the strictest good faith on the part of every one who effects an insurance of any kind; so that the contract will be void if the insurer has been guilty of fraud, or misrepresentation of any material circumstance, or concealment of any material fact which lies within his private knowledge, though no loss may have arisen therefrom. (Sm. Merc. Law, 396, 399, 412.)

Return of  
 premium.

Where a policy is void ab initio, but the insured has not been guilty of fraud or breach of the law, the premium must be returned. (2 Ste. Com. 156; Sm. Merc. Law, 403.)

Ordinary  
 species of in-  
 surance.

The most ordinary species of insurance are, life insurance, fire insurance, and marine or maritime insurance.

## II. *Life Insurance.*

Life insur-  
 ance defined.

Life insurance is a contract by which the insurer, in consideration of a gross sum or an annual payment, agrees to pay the person for whose benefit the insurance is effected, or his executors, administrators, or assigns, a certain sum of money or annuity on the death of the person whose life is insured,

whenever it happens, if the insurance is for PART III.  
TIT. II.  
CAP. IX. the whole life, or in the event of the death happening within a certain period, if the insurance is only for that period. (Sm. Merc. Law, 406 ; Bunyon, 1, 5.)

A person may effect an insurance upon his own life, or on the life of another in which he (the person insuring) has a pecuniary interest; but no insurance may be effected on a life in which the person for whose benefit or on whose account such insurance is made has no pecuniary interest, or by way of gaming or wagering; and such person's name must be inserted in the policy; and no greater sum may be received from the insurer than the value of the interest of the insured in such life. (Sm. Merc. Law, 406-7; 2 Ste. Com. 134-5; Bunyon, 14, 19-21.)

On what  
lives or  
events an  
insurance  
may be  
effected.

A wife has an insurable interest in the life of her husband; but a husband, parent, or child has not such an interest in the life of his wife, child, or parent, unless he has an interest in property dependent on the life of his wife, child, or parent. (Bunyon, 14-6.)

A trustee may insure in respect of his trust, and for the benefit of his trust estate. And a creditor may insure the life of his

PART III. debtor. (Sm. Merc. Law, 407-8; Bunyon,  
TIT. II.  
CAP. IX. 19, 20.)

**Declaration.** It is usual for the person whose life is insured to subscribe a declaration concerning his age, health, and other circumstances, which is generally, either expressly or by reference, embodied in the policy, and the correctness of which is a condition precedent to the responsibility of the insurers. (Sm. Merc. Law, 409; Bunyon, 31.)

**Proviso.** A proviso is ordinarily inserted, declaring the policy to be void in case the insured should die upon the seas, except in certain cases, or should go beyond Europe without leave, or (where a man insures his own life) should commit suicide or be executed for any crime, or if the age of the insured exceeds years, or if he has disease tending to shorten life, or if the declaration contains any untrue account. But this is generally expressed to be subject to the exception, that the policy shall remain in force so far as it regards any bonâ fide interest acquired in it by a third person. (Sm. Merc. Law, 409, 411; Bunyon, 67-8, 78.)

**Default in  
payment of  
premium.**

In case of non-payment of the premium in the stipulated manner, the policy will be void, and will not be revived by a subsequent

receipt of the premium, though the company may not have been at all damnified. Nor will it be an available excuse that the assured received no notice reminding him of the day for paying the premium ; for such a renewal notice, as it is termed, though customary, is not required by law.

PART III.  
TIT. II.  
CAP. IX.

By the conditions, a certain number of days after the day named for payment, called days of grace, are frequently allowed for the payment ; but these cannot be depended upon, if the life should drop after that day and before payment. (Sm. Merc. Law, 411 ; Bunyon, 65-6.)

Days of  
grace.

### III. *Fire Insurance.*

An insurance against fire is one by which the insurer, in consideration of a payment in gross or at stated intervals, agrees to indemnify the insured for a certain time against damage to his property by fire.

Fire insur-  
ance defined.

The insured must have a pecuniary interest in the property ; and he can only recover to the extent of that interest. And the assurance is not assignable without the insurer's consent. (Sm. Merc. Law, 414 ; 2 Ste. Com. 133-4.)

Interest.

Risks are usually divided into three : 1st, Risks,

PART III. common insurance; 2nd, hazardous; 3rd,  
 TIT. II. doubly hazardous. But there are also ex-  
 CAP. IX. — extraordinary risks, which are the subject of  
 special agreement. (Sm. Merc. Law, 415.)

Negligence. A loss by mere negligence, without fraud,  
 is covered by the policy. (Sm. Merc. Law,  
 417.)

Power of ob- To deter persons from setting their own  
 liging the in- premises on fire in order to obtain the sum  
 surance for which they are insured, the insurance  
 money to be office may, at the request of any person in-  
 laid out in terested in a building within the bills of  
 repairs. mortality burnt down or damaged, or upon  
 any suspicion of fraud, cause the insurance  
 money to be expended in repairs, unless the  
 party insured, within sixty days after adjust-  
 ment of the claim, gives security that the  
 money shall be expended, or the money at  
 that time is disposed of, to the satisfaction of  
 all parties. (Sm. Merc. Law, 417-8.)

Recovery of If a person has, under an insurance, re-  
 compensa- ceived a full compensation for his loss by  
 tion from a fire, and has afterwards recovered compensa-  
 wrongdoer, tion in an action for damages against the  
 and also person who caused the mischief, he is bound  
 from an in- to hand over the damages to the insurer, who  
 surer. in such case is the party really damnified.  
 (Add. Torts, 265.)

IV. *Marine Insurance.*

Marine insurance is a contract by which one party, for a stipulated sum, agrees to indemnify another against loss of a ship, or goods, or the freight, or the profits expected from the cargo, or of all or any of them, during a certain voyage or a certain period.

PART III.  
TIT. II.  
CAP. IX.  
Marine insurance defined.

Such insurances are usually undertaken by several persons, who are called underwriters, from their subscribing the policy, and each engaging thereby, on his own separate account, to indemnify to the extent of a certain sum set opposite their names, as subscribed or underwritten at the foot of the policy. (Arnould, 2; 2 Ste. Com. 127; Sm. Merc. Law, 340.)

Underwriters.

Almost all policies are effected by insurance brokers, or, as they are frequently called, policy brokers, who act as middlemen between the merchants and shipowners and the private underwriters or public insurance companies. (Arnould, 117.)

Brokers.

According to the ordinary course, the assured does not pay the premium to the broker, and the broker does not pay it to the

Premium.



PART III. underwriter, in the first instance. But, as  
 TIT. II.  
 CAP. IX. — between the assured and the underwriter, the  
 premiums are considered as paid at once. The  
 underwriter, however, looks to the broker,  
 and he looks to the insured for actual pay-  
 ment of the premium, on the settlement of  
 accounts between them respectively. (Sm.  
 Merc. Law, 342 ; Arnould, 118, 121.)

Open or  
 valued  
 policy.

A policy is either open or valued. An open  
 policy is one in which the value of the subject  
 insured is not specified in the policy, but is  
 left to be estimated in case of loss. A valued  
 policy is one in which the value of the sub-  
 ject insured is settled by agreement, and  
 specified in the policy. (Sm. Merc. Law,  
 347 ; Arnould, 14.)

Wager  
 policy.

A wager policy is one which shows, on the  
 face of it, that the contract is not a real in-  
 surance, but a wager ; that it is, in fact, a  
 pretended insurance, founded on an ideal  
 risk. (Arnould, 13.)

Interest of  
 the insured.

No insurance may be made on an English  
 ship (except one fitted out solely to cruise  
 against the Queen's enemies) or on any goods  
 on board an English ship, 'interest or no  
 interest,' i.e. without the necessity of the  
 insurer having an interest therein, or with-  
 out the benefit of salvage to the insurer.

(Sm. Merc. Law, 342-3 ; 2 Ste. Com. 135 ; PART III.  
TIT. II.  
CAP. IX.  
Arnould, 330-7.)

In order to have an insurable interest, it is sufficient to have a right of such a nature that the insurer may be benefited by the preservation of the thing insured, and prejudiced by its destruction. (Arnould, 281.)

If the insured fraudulently overvalues his interest, he cannot recover, even for the value proved to be on board. (Sm. Merc. Law, 348 ; Arnould, 362.) Overvaluing  
an interest.

An underwriter may not secure himself by effecting a reinsurance, that is, an insurance on that which he has insured, except in case of the bankruptcy or death of the insurer ; in which case a reinsurance is allowed, if in the policy it purports to be such, and does not exceed the sum before insured. (Sm. Merc. Law, 345 ; 2 Ste. Com. 128 ; Arnould, 339-42.) Reassurance.

A person who is insured by one set of underwriters may effect another insurance on the same subject with another set of underwriters, even though he may have been fully insured by the first set ; but he cannot recover more than the amount of his loss ; and, if he obtains the full amount of his loss on either policy, the underwriters upon that Double in-  
surance.

PART III. policy are entitled to a contribution from the  
 TIT. II. underwriters upon the other. (2 Ste. Com.  
 CAP. IX. — 128; Arnould, 345-6.)

Form of  
 policy.

The form of the policy in use was introduced into England by the Lombards, and is very inaccurate and ungrammatical in its language. It is usually printed with blanks, for the insertion of necessary particulars, as the intention of the parties happens to require. (Sm. Merc. Law, 346; Arnould, 16.)

In order to render intelligible the remarks which follow, it will be convenient to subjoin the common printed form of a Private Underwriter's (Lloyd's) Policy on Ship and Goods: —

‘In the name of God. Amen.

‘A. B., as well in his own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance, and cause himself, and them, and every of them, to be insured, lost or not lost, at and from — to any —, upon any kind of goods or merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the —, whereof is master under

God, for the present voyage, E. T., or who-  
soever else shall go for master in the same  
ship, or by whatsoever other name or names  
the same ship, or the master thereof, is or  
shall be named or called; beginning the  
adventure upon the said goods and mer-  
chandises from the loading thereof aboard the  
said ship, — upon the said ship, &c. —  
and so shall continue and endure during her  
abode there, upon the said ship, &c., and  
further until the said ship, with all her ord-  
nance, tackle, apparel, &c., and goods and  
merchandises whatsoever, shall be arrived at  
— upon the said ship, &c., until she hath  
moored at anchor twenty-four hours in good  
safety, and upon the goods and merchandises  
until the same be there discharged and safely  
landed. And it shall be lawful for the said  
ship, &c., in this voyage, to proceed, sail to,  
and touch and stay at any ports or places  
whatsoever, without prejudice to this insur-  
ance. The said ship and goods and mer-  
chandises, &c., for so much as concerns the  
assureds by agreement between the assureds  
and assurers in this policy, are and shall be  
valued at —. Touching the adventures  
and perils which we, the assurers, are con-  
tented to bear, and do take upon us in this

PART III.  
TIT. II.  
CAP. IX.  
—

PART III. voyage, they are of the seas, men-of-war,  
TIT. II. fire, enemies, pirates, rovers, thieves, jettisons,  
CAP. IX. letters of mart and counter-mart, surprisals,  
— takings at sea, arrests, restraints and detain-  
ments of all kings, princes, and people, of  
what nation, condition, or quality soever,  
barratry of the masters and mariners, and of  
all other perils, losses, and misfortunes that  
have or shall come to the hurt, detriment, or  
damage of the said goods and merchandises  
or ship, &c., or any part thereof. And in  
case of any loss or misfortune, it shall be  
lawful to the assureds, their factors, servants,  
and assigns, to sue, labour, and travel for, in,  
and about the defence, safeguard, and re-  
covery of the said goods and merchandises,  
or ship, &c., or any part thereof, without  
prejudice to this insurance; to the charges  
whereof we, the assurers, will contribute each  
one according to the rate and quantity of  
his sum herein assured. And it is agreed  
by us, the insurers, that this writing or  
policy of assurance shall be of as much force  
and effect as the surest writing or policy  
of assurance heretofore made in Lombard  
Street, or in the Royal Exchange, or else-  
where in London. And so we, the assurers,  
are contented, and do hereby promise and bind

ourselves, each one for his own part, our PART III.  
 heirs, executors, and goods, to the assureds; TIT. II.  
 their executors, administrators, and assigns, CAP. IX.  
 for the true performance of the premises,  
 confessing ourselves paid the consideration  
 due unto us for the assurance by the assured  
 —, at and after the rate of —.

‘*In Witness* whereof, we, the assurers, have  
 subscribed our names and sums assured in  
*London*.

‘N.B.—Corn, fish, salt, fruit, flour, and The Memo-  
 seed are warranted free from average, unless randum.  
 general, or the ship be stranded. Sugar,  
 tobacco, hemp, flax, hides, and skins are  
 warranted free of average under 5*l.* per cent.  
 And all other goods, the ship and freight, are  
 warranted free of average under 3*l.* per cent.,  
 unless general, or the ship be stranded.’

(Sm. Merc. Law, 348; Arnould, 17.)

A time policy is a policy by which a ship Time policy.  
 is insured for a certain period of time, instead  
 of for a certain voyage. Such an insurance  
 is effected in consequence of the ship being  
 intended to be employed in adventures  
 which, from their nature, it would be incon-  
 venient or even impossible to designate by  
 local termini. (Arnould, 462.)

**PART III.** The words 'lost or not lost' render the  
**TIT. II.** underwriter liable, although the ship be lost  
**CAP. IX.** at the time of insurance, unless the loss were  
 'Lost or not lost.' known only to the insured. Sometimes, however, these words are restrained by warranting the ship to be 'well' on a particular day. (Sm. Merc. Law, 357-8; Arnould, 21.)

**Jettison.** Jettison is a throwing of goods overboard, for the purpose of saving the ship. (Sm. Merc. Law, 361; 2 Ste. Com. 129; Arnould, 904.)

**Detainment.** The word 'people' signifies the governing power of a country. (Sm. Merc. Law, 361; Arnould, 836.)

**Arrest.** Arrest is a temporary detention, for a state purpose, of a ship and goods, by the government of the country to which it belongs, or some other friendly power, not with the object of prize (for then it would be a capture), but with a design to restore the ship and goods, or to pay for them. (Arnould, 836.)

The most usual species of arrest or detainment is an embargo, which is a prohibition of state issued to prevent the departure of ships or goods in time of war, or to exclude them from a port. (Sm. Merc. Law, 361; Arnould, 837.)

Barratry is a wilfully wrongful act or neglect, on the part of the master or mariners of the ship, by which the owners of the ship or general freighters are injured. (Sm. Merc. Law, 362-3; 2 Ste. Com. 129; Arnould, 844-5.)

PART III.  
TIT. II.  
CAP. IX.  
Barratry.

The word 'average,' employed in the Memorandum, means 'partial loss by sea damage,' and the expression, 'warranted free of average,' means 'so insured as to exclude all liability for partial loss by sea damage.' And the meaning of the clause is, that on certain articles of a peculiarly perishable nature, first enumerated, the underwriter shall not be answerable for any partial loss whatever. 2ndly. That on certain other articles of a less perishable nature, but still very liable to be destroyed by sea damage, secondly enumerated, he shall only be answerable when the amount of damage exceeds 5 per cent. of their value. 3rdly. That on ship, freight, and all other goods, he shall only be liable when the amount of damage exceeds 3 per cent. 4thly. But that, in all the three cases alike, the underwriter will be liable for any amount of partial loss, however small, in case the ship be stranded; and for every loss, however small,

Meaning of  
the Memo-  
randum.



PART III. of the nature of general average. (Arnould,  
TIT. II.  
CAP. IX. 33-4; Sm. Merc. Law, 367-8.)

**Stranding.**

In case of stranding, the underwriter becomes liable for every average or partial loss, even though the loss has been in reality not occasioned by the stranding. Stranding, within the sense of the Memorandum, occurs when a ship takes the ground, and remains either permanently or temporarily stationary, by reason of some extraordinary casualty. (Sm. Merc. Law, 368; Arnould, 878-81.)

**Warranty.**

A warranty in a policy is a stipulation, on the literal truth or fulfilment of which the validity of the entire contract depends.

**Express or implied.**

Warranties are either express or implied. An express warranty is one that appears in the policy, or in some writing which is by reference incorporated with it. An implied warranty is one which is deemed to exist in every policy, unless expressly negatived.

**Express.**

The things usually warranted are: 1. The time of sailing; 2. The safety of the ship at a certain time; 3. Departure with convoy, if in time of war; 4. Neutrality of the property, if in time of war; 5. Freedom from seizure in port.

The literal truth or fulfilment is so indispensably necessary as a condition preceden

to the right of the assured to recover on the policy, that all questions as to the materiality or immateriality of the thing warranted to the risk, or of the substantial truth or fulfilment, and all excuses for want of truth or compliance, are excluded. (Sm. Merc. Law, 372; Arnould, 626, 629-34, 637, 652, 889.)

PART III.  
TIT. II.  
CAP. IX.

The implied warranties are: 1. Not to deviate from the proper course of the voyage; 2. Seaworthiness; 3. Reasonable care to guard against the risks.

A deviation from the proper course, unless justified by necessity, discharges the underwriter, not from the commencement, but from the time of deviation; so that it does not exempt him from loss incurred before the deviation, but he is free from responsibility subsequent to the deviation, though the loss be not occasioned by the deviation, and though the ship resumed her proper course before it happened. (Sm. Merc. Law, 377-80; 2 Ste. Com. 130; Arnould, 393-6, 452.)

Deviation.

The ship must be seaworthy, that is, fit for sea, as regards repairs, equipments, crew, and other matters, at the commencement of the risk, i. e. at the port, where the insurance is 'at and from' a port; at the beginning of

Seaworthi-  
ness.

PART III. the voyage, where the insurance is 'from' a  
 TIT. II.  
 CAP. IX. port. The import of the term seaworthiness  
 — depends on the situation of the ship, and the  
 service in which she is engaged. Thus, if  
 she was in port, it merely denotes that she  
 was reasonably safe when in such a port; and  
 therefore, if she is insured 'at and from' it,  
 the insurance may be good while she is in  
 the port, although in want of repairs. (Sm.  
 Merc. Law, 381-2; Arnould, 689.)

There is no implied warranty that the  
 ship shall continue seaworthy in the course  
 of the voyage. (Sm. Merc. Law, 382;  
 Arnould, 693.)

Documents. The insured must take care that the ship  
 be documented according to her national  
 character; that is, that she be provided with  
 such documentary proofs of her national  
 character as are required by the law for her  
 protection. (Sm. Merc. Law, 384; Arnould,  
 727.)

General and  
 particular  
 average. The term average is used indiscriminately  
 to denote a loss and a payment in respect  
 of such loss. And there are two kinds of  
 average — general average and particular  
 average. General average loss is a loss  
 arising out of extraordinary sacrifices or ex-  
 traordinary expenses, incurred for the joint

benefit of ship and cargo; and a general average contribution is a contribution that is to be made by all parties in interest towards that loss. A particular average loss is a loss arising from damage, accidentally and proximately caused by the perils insured against, or from extraordinary expenditure necessarily incurred for the sole benefit of some particular interest, as of the ship alone or the cargo alone.

PART III.  
TIT. II.  
CAP. IX.

The damage or expense in the case of particular average, instead of being met by the general body of those who are interested in the adventure, as in the case of general average, falls entirely upon the particular owner of the property constituting the subject of the damage or expenditure. (Arnould, 895, 970-1.)

Loss is either total or partial, called also average loss. A total loss is one on account of which the insured is entitled to recover the whole amount insured. Total losses are

Losses.

Total.

either absolute or constructive. An absolute total loss is one which takes place when the subject insured is wholly destroyed, or cannot be recovered, at least without such an expense as to render the attempt to recover it worthless. A constructive total loss is one

Absolute  
total loss.

Constructive  
total loss.

**PART III.** which takes place when the subject insured  
**TIT. II.** is not wholly destroyed, but its destruction  
**CAP. IX.** is imminent, or its recovery exceedingly doubtful.

**Liability of underwriter.**

In the case of an absolute total loss, the underwriter is liable for the whole amount of his subscription absolutely. But in the case of a constructive total loss, the underwriter is only liable for the whole amount of his subscription in case the insured, within a reasonable time, gives notice of abandonment.

**Abandonment.**

Abandonment is a relinquishment, to the insurer by the insured, of the subject of insurance, or whatever part thereof may be saved, where the insured calls upon the insurer to settle with him for a total loss, in consequence of the greatness of the damage, the imminent danger of destruction, or the improbability of recovery. (See Arnould, 1007-9; Sm. Merc. Law, 386-7; 2 Ste. Com. 131.)

The insured is never obliged to abandon, unless he claims for a total loss, in cases where there is neither, on the one hand, an absolute total loss, nor, on the other, only a partial loss. An abandonment is only necessary to make a constructive total loss. The insured may, if he chooses, abstain from giving notice of abandonment, and take the

chance of recovering, and, if he recovers PART III.  
 part, claim for a partial loss, or, if he recovers TIT. II.  
 nothing, claim for an absolute total loss. CAP. IX.  
 (See Arnould, 1008, 1015; Sm. Merc. Law,  
 390; 2 Ste. Com. 131.)

If the owner has been obliged to make Mode of cal-  
 repairs, in consequence of damage to the culating sum  
 ship, he is not allowed the full cost of to be paid by  
 repairs, unless the ship was new; but one- the under-  
 third is deducted, in consideration of the writer for  
 benefit which he derives from new materials damage to  
 in lieu of old. This is termed deducting ship,  
 one-third new for old. (Sm. Merc. Law,  
 393; Arnould, 996.)

In the case of damage to goods, the mode or for damage  
 of calculation is this: to ascertain the to goods.  
 difference in proportion between the gross  
 proceeds of the goods on their arrival at  
 their destined port, and what would have  
 been their gross proceeds had they not  
 been injured; and the underwriter pays an  
 aliquot part of the original value corre-  
 sponding with that difference. Hence, if that  
 difference is a quarter, the underwriter pays  
 a quarter of the original value. For the  
 original value is the sum which the under-  
 writer agreed to insure; and he does not  
 engage to put the merchant in the same

**PART III.** position he would have been in had all his  
**TIT. II.** goods arrived in sound condition at the port  
**CAP. IX.** of destination, and realised the profit which  
 would have accrued had they been all sound, but only to put him, in regard to the damaged portion of such goods, in the situation in which he was at the beginning of the risk. (Sm. Merc. Law, 393-4; Arnould, 980-5.)

In an open policy, the original value is ascertained by taking the invoice price at the port of lading, together with all expenses till put on board, including premium and costs of insurance. In a valued policy, it is the value expressed in the policy. (Arnould, 981; Sm. Merc. Law, 394.)

**Adjustment** When a loss has taken place, the broker usually proceeds to adjustment, that is, the settling the amount receivable by the assured, after deductions, and the fixing the proportion payable by each underwriter. (Sm. Merc. Law, 395; Mau. & Pol. 370, 373; Arnould, 1199.)

‘Return of premium for short interest.’

When part only of the goods comprised in the policy are put on board, there is a ‘return of premium for short interest;’ that is, a portion of the premium corresponding to the deficiency must be returned. (Sm. Merc. Law, 403; Arnould, 1224.)

## CHAPTER X.

## BAILORS AND BAILEES GENERALLY.

BAILMENT is a delivery of goods in trust, upon a contract expressed or implied.

PART III.  
TIT. II.  
CAP. X.

There are six sorts of bailments: 1. A bailment of goods to keep gratuitously for the use of the bailor; and this is called a depositum. 2. A loan of chattels gratis, to be used by the bailee; which is called commodatum. 3. A delivery of chattels, to be used by the bailee for hire; which is called locatio et conductio. 4. A delivery of chattels as a pawn or pledge, to be a security to the bailee for money borrowed from him by the bailor; which is called vadium. 5. A delivery of chattels in order that they may be kept or carried, or that something may be done about them, for a reward, to be paid by the bailor to the bailee; which is called locatio operis faciendi. 6. A delivery of chattels to somebody who is to carry them, or do something about them,

Definition of  
bailment.  
Different  
kinds of bail-  
ments.



PART III. gratis; which is called mandatum. (Add.  
TIT. II.  
CAP. X. Torts, 267-8; 1 Sm. L. C. 190-215.)

Responsi-  
bility of the  
different  
kinds of  
bailles.

As to the first, the bailee has no right to use the thing deposited, but he is only answerable for great neglect. (Add. Torts, 268; Broom Com. 780-1; Sm. L. C. 191-2.)

As to the second, the bailee or borrower is answerable for the least neglect, but not for reasonable wear and tear. And the lender is responsible for defects known to him and not to the borrower, which make the loan perilous. (Add. Torts, 268-9; Broom Com. 783; Sm. L. C. 193.)

As to the third, the bailee is bound to take all ordinary care. The owner must bear the risks to which the chattel is naturally liable, but not risks occasioned by want of ordinary care on the part of the hirer. (Add. Cont. 425-6; Sm. L. C. 193.)

If the owner sends his own servant to drive a hired carriage, the hirer is exempt from all responsibility, unless he takes the management himself, or desires the driver to drive in a particular manner, which occasions the damage complained of. If a horse is taken ill on the road, the hirer will not be responsible, though the horse die, if he sent for a farrier; but if he did not, he will be

answerable. It is also the duty of the hirer to supply the horse with suitable food. (Add. Torts, 270; Oliph. 202, 204, 206-7.)

PART III.  
TIT. II.  
CAP. X.

As to the fourth kind of bailment, the bailee is only required to use ordinary care for restoring the chattels, unless a tender of the money has been made. But if he retains them after such tender, he will be responsible for them at all events. (Add. Torts, 271; Sm. L. C. 194; Broom Com. 779, 785.)

As to the fifth, if the bailee exercises a public employment for pay, as in the case of a common carrier, he will be answerable at all events; subject to certain exceptions. (Add. Torts, 271; Broom Com. 784. See p. 255-8, *infra*.)

But, in general, a private bailee to whom things are delivered, in order that they may be carried, or that something may be done about them, for a reward, is only obliged to use ordinary care. If lost, however, the loss itself affords the strongest presumption of negligence, and it is for the bailee to rebut this presumption by evidence. (Add. Torts, 27, 271, 276; Sm. L. C. 197; Broom Com. 784.)

Persons who are paid for taking care of, and not merely for finding a place of deposit for,

PART III. living animals, goods, or chattels intrusted  
 TIT. II. to them for that purpose, such as warehouse-  
 CAP. X. men and wharfingers, are bound to take the  
 — same care of them which the most careful of  
 men take of their own property. And they are,  
 primâ facie, responsible for a theft committed  
 by their own servants, and can only discharge  
 themselves by showing that the greatest care  
 on their part could not have prevented the  
 theft. (Add. Torts, 273-5.)

As to the sixth species of bailment, if a  
 man acts by commission for another gratis,  
 and behaves himself with great negligence,  
 he is answerable. (Add. Torts, 271 ; Broom  
 Com. 780-1, 790.)

Special qua-  
 lified pro-  
 perty of a  
 bailee,

and lien.

A bailee has, together with the possession,  
 a special qualified property, enabling him to  
 maintain an action against such as injure or  
 take away the chattels. And he has also,  
 in certain instances, that right of retaining  
 possession which is called a lien. (2 Ste.  
 Com. 80-1. See supra, p. 133.)

## CHAPTER XI.

## EXECUTORS AND ADMINISTRATORS.

AN executor is the person to whom a testator commits the execution of his will. An administrator is the person to whom the Court of Probate commits the management of the affairs of an intestate.

PART III.  
TIT. II.  
CAP. XI.

Who is an  
executor or  
administra-  
tor.

Even married women and infants may be executors; but no person who is sole executor can act until the age of twenty-one years. (2 Bl. Com. 503; 1 Wms. Ex. 201-2.)

Who may be  
one.

An executor may contract and do many acts before he proves the will; but an administrator may do nothing till letters of administration are issued: for the former derives his power from the will, and not from the probate; while the latter derives his title entirely from his appointment as administrator, though his title relates back to the intestate's decease. (Sm. Law of Prop. 951; Broom Com. 593; 2 Bl. Com. 507.)

Acts before  
probate or  
administra-  
tion.

The whole personal property vests in the

**PART III.** executor ; so that the demands of creditors  
**TIT. II.** and legatees are personal upon the executor ;  
**CAP. XI.** and though they exist in respect of the property, and are limited by the extent of it, yet they are no lien upon it, whether in his hands or in the hands of his assignees, unless they are affected with fraud. (1 Wms. Ex. 576 ; Co. Litt. 290. b., n. 1, xiv. 1.)

Personally vests in the executors, who thereby become liable to creditors and legatees.

**Rights of executors or administrators to damages, covenants, or duties.** Executors and administrators represent the testator, and are entitled to all damages which accrued to the testator in his lifetime, and, in general, to the benefit of all covenants and duties belonging to the testator. (1 Pres. Shep. T. 175.)

**Right of retainer.** An executor or administrator has a right to retain out of legal assets the amount of a debt due to him, either beneficially or as trustee, as against creditors of equal degree. (2 Wms. Ex. 936-8.)

**Where executor or administrator is personally liable.** An executor or administrator will be personally liable for money lent to or received by, or work performed for, or goods sold and delivered to him. (Broom Com. 595.)

**Distribution of the assets.** If an executor or administrator has, except under the direction of the Court of Chancery, or except in the case provided for by the stat. 22 & 23 Vic. c. 35, s. 29, paid away the residue in ignorance of the existence of any

debt, he is still liable. (2 Spence, 921.) But an executor or administrator fairly stating the facts, and paying over the assets under the direction of the Court of Chancery in an administration suit, is fully indemnified against all existing or contingent demands on the estate. (*Waller v. Barrett*, 24 Beav. 413.) And by the stat. 22 & 23 Vic. c. 35, s. 29, where an executor or administrator has given such notices as would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator will, at the expiration of the time named in the notices for sending in such claims, be at liberty to distribute the assets among the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and will not be liable for the assets so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of such assets.

PART III.  
TIT. II.  
CAP. XI.

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TITLE III.  
RELATIONS OF LIFE IN RESPECT OF  
EMPLOYMENT.

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CHAPTER I.

MASTERS, SERVANTS, WORKMEN, AND  
APPRENTICES.

**PART III.** THE term servant legally applies not only  
**TIT. III.** to menial servants, but to other persons em-  
**CAP. I.** ployed for hire in a person's domestic esta-  
**Legal import** blishment, or in his business; such as tutors,  
**of the term** governesses, and clerks.  
**servant.**

**Duration of** If no time is limited for the duration of  
**service.** the service, either expressly or by implica-  
tion, the hiring is a general one, and is to be  
considered to be for a year certain; and if  
the servant continues beyond the first or any  
subsequent year, a contract for a second or  
further year is implied. But, in the case of  
menial or domestic servants, the contract is  
dissoluble by a month's warning, or payment  
of a month's wages. And, in the absence of  
indications to the contrary, a general hiring  
at weekly wages is but a weekly hiring.

(Sm. Merc. Law, 425-6; Sm. Mast. and Serv. 46, 50, 52; 2 Ste. Com. 239-40.)

PART III.  
TIT. III.  
CAP. I.

A person is answerable for the wrongful acts, or negligence, or unskilfulness of his domestic servants, and of those whom the law denominates his servants (as being selected and appointed by him to do any work, although not in his immediate employ or under his superintendence), if such acts, negligence, or unskilfulness occurred in the course of their employment as servants to him. And the servant is also himself liable for any injury he may have caused a third person. But where the injury, whether it was done wilfully or otherwise, was not done by the servant in the course of his employment, redress can only be had from him. (Broom Com. 669-70, 672, 676, 685; Sm. Mast. and Serv. 183, 188, 190, 193; 2 Ste. Com. 245-8.)

Responsi-  
bility of the  
master for  
the servant's  
act or negli-  
gence.

Thus the master is responsible for injury caused by his servant in driving, unless the servant cannot be regarded as having caused the injury when acting under his master's orders, but in pursuing his own wrongful devices. The owner of a carriage let out to hire is responsible for his driver, unless the injury happens in consequence of the latter



PART III. being required by the hirer to do some  
 TIT. III. unusual or improper thing. (Add. Torts,  
 CAP. I. 241-2; Sm. Mast. and Serv. 185, 191.) For  
 — a crime or wilful injury committed by the  
 servant, he himself is alone liable, unless done  
 by the master's command or encouragement.  
 (2 Ste. Com. 248-9; Rosc. Evid. 518; Selw.  
 N. P. 1119.)

A master is not responsible for an injury  
 happening to one of his servants, in conse-  
 quence of the negligence of another servant,  
 provided the servants were engaged in one  
 common employment, and provided the ser-  
 vant was not exposed to unreasonable risks,  
 and the master endeavoured to select pro-  
 per servants. This principle applies even  
 to railway companies and their servants.  
 (Add. Torts, 248; Broom Com. 685-6; Sm.  
 Mast. and Serv. 134, 145.)

Refusal of a  
 servant to  
 expose him-  
 self to injury. A servant may decline to do that from  
 which he has reason to apprehend bodily  
 injury. (Add. Torts, 247.)

Responsi-  
 bility of a  
 servant for  
 want of care,  
 knowledge,  
 or skill. If a person who undertakes the perfor-  
 mance of work, fails to execute it with care,  
 diligence, and ability, he is responsible to his  
 employer for damages. And this applies to  
 solicitors and medical men, as well as other  
 persons. (Add. Torts, 250-3.)

A servant may be discharged for the fol-

lowing causes:—1. Wilful disobedience; 2. gross moral misconduct; 3. habitual negligence, or conduct calculated seriously to injure his master's business; 4. incompetence, or permanent disability from illness. And on these grounds the master may discharge him without warning, and need only pay the wages due before the dismissal. (Sm. Mast. and Serv. 77, 85; 2 Ste. Com. 243.) But if a domestic servant is temporarily disabled by sickness or other accident, this does not justify the master in discharging him without such warning or wages as he might otherwise claim. But a master is not bound to provide his servant with medicine or medical attendance. (2 Ste. Com. 243; Sm. Mast. and Serv. 85, 131-2; Add. Cont. 386.)

PART III.  
TIT. III.  
CAP. I.

Discharge,  
and right to  
wages on  
dismissal or  
quitting service.

A servant hired generally, and dismissed without cause, will have a right to wages up to the expiration of the period for which he is to be deemed to have been hired. But if a servant quits his master without cause, he thereby forfeits all right to wages. (Sm. Merc. Law, 426-7; Sm. Mast. and Serv. 113, 127.)

A master is not bound to give his servant any character at all. If, however, he gives character, it ought, of course, to be a true

Giving a  
character.

**PART III.** one. Yet if he gives a bad character untruly,  
**TIT. III.** he will not be liable, unless he gives it volun-  
**CAP. I.** tarily and without being applied to, or unless  
 — it can be shown to have proceeded from malice,  
 as where it is proved to have been contrary to  
 his knowledge or belief. (Sm. Mast. and Serv.  
 249-50; 2 Ste. Com. 245; Add. Torts, 589;  
 Broom Com. 722; Selw. N. P. 1055, 1267;  
 Rosc. Evid. 567.)

A master is bound, in answer to enquiries,  
 to give information of misconduct of which  
 a servant has been guilty after having left his  
 service. And if a master gives a good cha-  
 racter, he is bound to communicate to the  
 person to whom such character was given, any  
 subsequently discovered circumstances which  
 show that it was not deserved. (Add. Torts,  
 589-90; Sm. Mast. and Serv. 258-9.)

Fire

Servants, through whose negligence or  
 carelessness a fire happens, are punishable by  
 a fine of 100*l.*, or imprisonment. But the  
 master is also responsible for any such da-  
 mage caused by the negligence of his servant  
 while executing his orders. (Add. Torts, 132;  
 Sm. Mast. and Serv. 185, 281.)

Enticing  
 away a ser-  
 vant, or  
 keeping him  
 from his  
 master.

A person who knowingly induces a servant  
 to leave his master's service, or keeps him  
 as servant after he has quitted his place,

and before the expiration of the stipulated period of service, is liable to an action. (Add. Torts, 696; Sm. Mast. and Serv. 87-9; 2 Ste. Com. 245.)

PART III.  
TIT. III.  
CAP. I.

A workman by the job or piece is the servant of the person who contracted with him, until the work is finished; and whilst such work is in progress, no other person may employ him, so as to cause such work to be unfinished. (Add. Torts, 696.)

Employing  
another per-  
son's task-  
workman.

A master may sue for the seduction of, or any personal injury to, his servant, if he thereby loses the servant's services. (Broom Com. 814; Sm. Mast. and Serv. 96-8.)

Action for  
injury to a  
servant.

The contract of apprenticeship is a contract whereby one person, as master, engages to instruct another, as his apprentice, and whereby the latter becomes bound to devote his whole time and services, during a limited period, for the benefit of his instructor, and frequently also to pay him a sum of money. (Sm. Merc. Law, 458; Add. Cont. 392-3.)

Contract of  
apprentice-  
ship.

A writing is necessary to constitute an apprenticeship; and indeed it is now usually effected by deed, containing covenants by the master and apprentice, or by some one on behalf of the apprentice, for the due discharge of the duties of the master and apprentice towards each other.

PART III.  
TIT. III.  
CAP. I.

—  
Rights of  
master and  
apprentice.

An infant may bind himself; but he may avoid the agreement, even while under age, if it is clearly for his interest to do so. But infants are usually bound apprentices by their parents with their consent, and pauper children are bound by the guardians of the poor, and are called parish apprentices.

No action will lie against an apprentice upon any of the covenants in the deed of apprenticeship; but in case of any disobedience to the master's lawful orders, or of negligence or immorality, the master may administer to him, if an infant, moderate and reasonable corporal chastisement, such as a father may inflict upon his child, or a schoolmaster upon his pupil; and he may also bring him before justices of the peace, who may punish him; or he may maintain an action against any adult who has covenanted for his good behaviour. On the other hand, the master is bound to minister to the apprentice's necessities in health and in sickness; providing him with food, medicine, and medical attendance. And the master may be sued, or, in a gross case, indicted, for ill usage and neglect of the apprentice. (Sm. Merc. Law, 458, 460; Sm. Mast. and Serv. 76, 131, 329; Add. Cont. 392-4; Macph. 479, 480; 2 Ste. Com. 240-1.)

There are various ways in which an ap- PART III.  
TIT. III.  
CAP. I.  
 prenticeship may be dissolved. Thus : 1. It Determina-  
tion of ap-  
prenticeship.  
 may be determined by consent of the parties, in case the apprentice is under age, and the dissolution is for his advantage. 2. By the election of an apprentice at his full age, where the dissolution is clearly for his benefit. 3. By the master's bankruptcy. 4. By the death of the master or apprentice. 5. By the interposition of justices, upon certain grounds, on the complaint of the master or of the apprentice. (Sm. Merc. Law, 458, 461 ; Add. Cont. 394-5.)

By the consent of all parties, a transfer may Transfer of  
services.  
 be made of the services of the apprentice to another master. (Sm. Merc. Law, 462.)\*

\* As to the custom of apprenticeship in the City of London, see an interesting article in the *Law Magazine* for August, 1862.

## CHAPTER II.

## PRINCIPALS AND AGENTS.

**PART III.** AN agent is a person empowered to act in  
**TIT. III.** the name of another, who is called his  
**CAP. II.** principal.

Agent de-  
 fined.  
 Who may be  
 agent.

An infant may be an agent, and a feme-  
 covert may be agent either for her own hus-  
 band or another person. (Sm. Merc. Law,  
 117; Broom Com. 517; 2 Ste. Com. 64.)

Mode of ap-  
 pointment.

An agent may in general be appointed  
 even verbally, or tacitly by conduct. But an  
 agent for the purposes of the 1st, 2nd, and  
 3rd sections of the Statute of Frauds, must  
 be appointed in writing. And an agent who  
 is to execute a deed, must be appointed by  
 deed. (Sm. Merc. Law, 118; Broom Com.  
 534; 2 Ste. Com. 64.)

What may  
 be deputed.

That which a person may do himself as  
 principal, he may (except in one or two cases)  
 appoint an agent to do for him. But an  
 agent cannot delegate the duties of his  
 agency, unless specially authorised, or ex-  
 cept those which are of such a nature that

he cannot be expected to perform them personally. (Sm. Merc. Law, 116; Broom Com. 516; 2 Ste. Com. 67.)

PART III.  
TIT. III.  
CAP. II.

Agencies, as regards their extent, are of three kinds: 1. Special, that is, an authority to do a particular act, or carry out a particular matter. 2. General, that is, an authority to do everything which is requisite in relation to a particular business or employment. 3. Universal, that is, to do all acts for the principal which he may legally depute another to do. So that a man may have both a special and a general agent, or one general agent in regard to one business, and another general agent in regard to another business. (Broom Com. 517-8; 2 Ste. Com. 65; Sm. Merc. Law, 120, 134-5.)

Different  
sorts of  
authorities.

Again, an agent may be limited by certain instructions as to his conduct, or unlimited, leaving his conduct to his own discretion. If limited by instructions, he ought to carry them into effect as fully and exactly as possible, consistently with propriety. If unlimited, he ought to pursue the accustomed course of business, or, if prevented, to give notice to his principal. (Sm. Merc. Law, 120; Selw. N.P. 807.)

Extent of  
agent's  
authority.

An agent has authority to bind his princi-



PART III. pal, not only where he is expressly authorised,  
 TIT. III. but in other cases where such authority is to  
 CAP. II. be inferred from the conduct of the employer,  
 — As between the principal and third persons,  
 the agent's authority, where not expressly  
 defined, must be measured by the extent of  
 his usual employment. If a person sends  
 his servant with ready money to buy, and he  
 buys upon credit, the master is not charge-  
 able, unless the servant has usually bought  
 for his master upon credit. (Sm. Merc. Law,  
 131-2; Add. Cont. 608.) And so, if a clerk  
 has been allowed to draw, indorse, or accept  
 notes or bills, he will acquire an implied  
 authority to bind the master, though the  
 money never come to the master's use. The  
 same principle is applied to all other mer-  
 cantile transactions, and even though the  
 servant has been dismissed from his em-  
 ployer's service, provided the third parties  
 had no reason to be aware of such dismissal.

The authority of the agent must be in-  
 ferred from facts connected with the employ-  
 ment, not from considerations of the utility  
 or propriety of such an authority. (Sm. Merc.  
 Law, 132-4; Add. Cont. 608, 610-11.)

A general agent is only authorised to act in  
 the usual way of business. (2 Selw. N.P. 807.)

Under ordinary circumstances, agents are authorised to do all that is necessary or usual for effectuating the main intention of the principal in the best manner. (Sm. Merc. Law, 137; Broom Com. 521.)

PART III.  
TIT. III.  
CAP. II.

Although a shopman be authorised by his employer to receive payment for goods in the shop, that does not necessarily involve an authority to receive money for his employer elsewhere. (Broom Com. 521.)

If a particular agent exceeds his authority, his principal is not bound; for it is the duty of persons dealing with him to ascertain his authority. But if a general agent exceeds his authority, his principal is bound, provided his acts are within the usual dealing and scope of the business. And a principal cannot, unknown to parties dealing with his general agent, restrict the agent's authority to perform all things customary in the business. (Sm. Merc. Law, 134-5; Add. Cont. 608; 2 Ste. Com. 68; Broom Com. 517, 520.)

Exceeding  
authority.

If an agent exceeds his authority, any loss arising therefrom will fall on him; but any benefit will belong to his employer. (Sm. Merc. Law, 120-1.)

It is the duty of an agent to keep clear and regular accounts and vouchers, and to

Accounts.

PART III. communicate the result to his principal from  
 TIT. III. time to time ; and if he does not, he  
 CAP. II. — will not be allowed the compensation which  
 would otherwise belong to his agency. And  
 if he mixes up his principal's property with  
 his own, he is put to the necessity of show-  
 ing clearly what part of the property be-  
 longs to him ; and so far as he is unable to  
 do this, it is treated, both at law and in  
 equity, as the property of the principal.  
 (Sm. Manual, 326.)

Distinctions  
 as to remun-  
 erated and  
 unremune-  
 rated agents.

A remunerated agent may be compelled to fulfil his engagement. An unremunerated agent cannot be ; yet if he begins to act, and is guilty of misconduct, he will be liable. A remunerated agent will be liable for the consequences of his want of skill. An unremunerated agent is only bound to use that skill which he possesses. A remunerated agent is bound to act with reasonable diligence. An unremunerated agent is only answerable for gross negligence. (Sm. Merc. Law, 120, 128 ; Sm. Cont. 152.)

Commission. The agent's remuneration is called his commission. The amount is fixed by the contract, or by usage or statute ; or, if not so fixed, it may be determined by a jury. He may be deprived of his commission by neglecting to keep an account, or by other

gross misconduct or negligence, or by gross unskilfulness. (Sm. Merc. Law, 129; Add. Cont. 595; Story on Agency, § 326, 331-4.)

PART III.  
TIT. III.  
CAP. II.

An agent may charge his principal with all advances which he has made in the regular course of trade, or in some pressing emergency. (Sm. Merc. Law, 130-1; Story on Agency, § 335-6.)

Advances by agent.

The principal is bound to indemnify his agent against all losses or damages incurred in properly executing his office. (Sm. Merc. Law, 131; Story on Agency, § 339-40.)

Indemnity.

An agent who executes a deed may either sign his principal's name, or express that it is executed by himself as agent for his principal, or by his principal, through him, the agent. But if he simply signs his own name, his principal will not be bound. (Sm. Merc. Law, 138-9; Paley, 180-2.)

Execution of a deed.

An agent may be employed to draw, indorse, or accept negotiable instruments; and in such case the principal is said to draw, indorse, or accept by procuration. An agent so acting should not do so in his own name; for if he does, he will himself be liable to the holder. (Sm. Merc. Law, 139; Add. Cont. 628; 1 Selw. N. P. 362.)

Drawing, indorsing, or accepting bills or notes.

The words per procuration denote a limited authority, into the extent of which the per-

PART III. son who takes the bill is bound to enquire.  
 TIT. III.  
 CAP. II. (1 Selw. N. P. 362.)

Purchases  
 from an  
 agent.

Any person may contract for the purchase of goods with an agent who is intrusted with the possession of the goods, or to whom they may be consigned, and may receive the same of, and pay for the same to, the agent, even knowing him to be such, if such contract and payment are made in the ordinary course of business, unless he has notice that the agent is not authorised to sell or to receive the price. (Sm. Merc. Law, 142; 2 Ste. Com. 77.)

Pledges, lien,  
 or securities  
 by an agent.

An agent intrusted with the possession of goods, or of the documents of title to goods, is also deemed to be the owner of such goods and documents, so far as to give validity to any contract or agreement, by way of pledge, lien, or security, *bonâ fide* made by any person with such agent; notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement was made is only an agent. (Sm. Merc. Law, 143; 2 Ste. Com. 77.)

Notice to  
 agent or to  
 principal.  
 Agent's re-  
 presentation  
 or admission.

Notice to the agent is notice to the principal; and notice to the principal, generally speaking, is notice to the agent; and the

agent's representation binds the principal; and his admission is evidence against the principal. (Sm. Merc. Law, 150-1; 2 Selw. 815.)

PART III.  
TIT. III.  
CAP. II.

Payment, tender, or delivery to an agent, in the usual course of his employment, is payment, tender, or delivery to the principal. (Sm. Merc. Law, 151-4; 1 Selw. N. P. 108; Add. Cont. 604.)

Payment,  
tender, or  
delivery to  
an agent.

A debtor should not pay to an agent money due upon a written security, such as a bill or bond, unless the agent produces the security, or unless the debtor knows that the agent is empowered to receive the money; for, otherwise, the debtor may not be discharged, unless the money reaches the principal. (Sm. Merc. Law, 153; Paley, 274-6.)

A principal is answerable for the negligence of his agent, but not for his wilful and malicious tort, or for fraud not sanctioned by the principal, and of which he has not elected to take the benefit. (Sm. Merc. Law, 154-6; Add. Cont. 617.)

Responsi-  
bility for  
agent's acts  
or neglects.

The agent's power is in general determinable: 1. By the revocation of the principal, unless it is coupled with an interest, or given for valuable consideration; as in the case of a power of attorney given by way of

Determina-  
tion of  
agent's au-  
thority.

PART III. security. 2. By the agent's renunciation of  
 TIT. III. it, with the consent of the principal. 3. By  
 CAP. II. the principal's marriage, if a feme sole.  
 4. By the principal's death.\* 5. By his bank-  
 ruptcy, except in certain cases. 6. By the  
 fulfilment of his commission. 7. By the  
 expiration of the time limited for the du-  
 ration of the agency. (Sm. Merc. Law,  
 158-60; 2 Ste. Com. 65; Add. Cont. 587-8.)

Ratification  
 of the act of  
 an agent.

An act professedly done for another per-  
 son, though without any precedent authority  
 from him, becomes his act, if subsequently  
 ratified by him. (Broom Com. 681; Add.  
 Cont. 609.)

Agent's  
 liability.

Agents (except masters of ships) profes-  
 sedly contracting, as such, for known and  
 responsible employers, incur no personal  
 liability to third parties, except for losses  
 incurred by their own fault or negligence.  
 But if an agent contracts, without professing  
 to act as an agent, the opposite party may,  
 in most cases, at his option, charge either  
 the agent or the principal, on discovering  
 him. And the rule appears to be the same,  
 where, at the time of contracting, he states  
 himself to be an agent, but does not disclose  
 his principal. (Sm. Merc. Law, 123-4, 161,

\* But see 22 & 23 Vic. c. 35, s. 26, as to trustees, ex-  
 ecutors, and administrators.

168; 2 Sm. L. C. 321, 333, 336; Broom Com. PART III.  
TIT. III.  
CAP. II. 516, 526-7, 529; 2 Ste. Com. 66; Add. Cont. 601-2, 607, 626, 628-9.)

And if an agent lends money or enters into any other contract in his own name, but in reality for an undisclosed principal, either principal or agent may sue upon it; unless it be by deed; in which case the agent alone can sue upon it. (Sm. Merc. Law, 161, 167; Broom Com. 527; 2 Ste. Com. 66; Add. Cont. 607; 2 Sm. L. C. 333, 336.) Suits by an agent.

Factors are mercantile agents who are intrusted with the possession and disposal of property. Brokers are mercantile agents who are employed to enter into contracts respecting property, without being in possession of such property. (Sm. Merc. Law, 118; 2 Ste. Com. 76.) Factors and brokers.

It is the duty of a factor to keep the goods with the same care with which a prudent man would keep his own; and it is often, if not usually, his duty to insure them, or, if unable to insure, to give notice of his inability to his principal. (Sm. Merc. Law, 124-5; Story on Agency, § 111; Paley, 15, 16.) Keeping and insuring goods.

If no price is fixed for the goods, the factor must sell them for their fair value. He may sell for credit, or not, according to the usual course of business. If he gives Price. Credit.



PART III. reasonable credit, where it is usual, to a per-  
 TIT. III. son of good credit, he is discharged, and will  
 CAP. II. — be entitled to his commission, notwithstanding  
 any subsequent insolvency of the pur-  
 chaser ; provided he informs his principal of  
 the transaction within a reasonable and usual  
 time. (Sm. Merc. Law, 126 ; Paley, 26-7.)

Del credere. Sometimes, however, the factor sells under  
 a commission called *del credere*, from an  
 Italian mercantile phrase signifying guaran-  
 tee, by which the factor, for an additional  
 premium, warrants the solvency of the pur-  
 chaser. (Sm. Merc. Law, 126 ; 2 Ste. Com. 76.)

Duty of a solicitor. It is the duty of a solicitor to keep his  
 client's secrets, and not to disclose the con-  
 tents of any of his title-deeds ; and to warn  
 his client not to enter into covenants and  
 stipulations where they are attended with un-  
 usual liability. (Add. Torts, 251-2 ; Pulling,  
 148.)

Where any doubt or question arises as to  
 the interpretation and legal operation of  
 assurances, a solicitor may take the opinion  
 of counsel upon them, for his protection. If,  
 instead of doing this, he relies upon his own  
 judgment respecting them, and makes mis-  
 takes, he will be answerable in damages.  
 (Add. Torts, 253-4 ; Pulling, 423.)

## CHAPTER III.

CARRIERS, PASSENGERS, AND OWNERS OF LUG-  
GAGE; INNKEEPERS AND GUESTS; LODGING-  
HOUSE KEEPERS AND LODGERS.

THIS subject might have been treated of PART III.  
under the preceding Title; but, on the whole, TIT. III.  
it seemed more proper or natural to consider CAP. III.  
it in this place.

A common carrier is one who plies be- Definition of  
a common  
carrier.  
tween certain termini, whether by land or by  
water, and undertakes, for a pecuniary remu-  
neration, to transport the goods of such as  
choose to employ him. Of this description  
are the proprietors of stage-wagons, coaches  
carrying goods, barge-owners, possessors of  
ships engaged generally in the conveyance of  
goods for hire, and canal and railway com-  
panies, unless the Act constituting them  
limits their liability. (Sm. Merc. Law, 287;  
Chit. & Tem. on Car. 14-18; Selw. N. P.  
441.)

Every common carrier is under a legal Duty of  
carriers.  
obligation to carry all things belonging to

PART III. the description of things which he publicly  
TIT. III.  
CAP. III. professes to carry, and he is bound to do so  
— for anyone who is ready to pay him (in  
advance, if desired) his customary hire; pro-  
vided he has room for the things in his cart  
or carriage, to convey them in safety. But  
he may, if he pleases, carry, under a special  
contract limiting his liability, anything  
which he does not usually profess to carry.  
The hire must be at a reasonable and uni-  
form rate. (Add. Torts, 304; Broom Com.  
793; 2 Ste. Com. 83-4; Chit. & Tem. on  
Car. 23-5, 60, 77-80; 1 Selw. N. P. 441.)

Every common carrier of passengers with  
luggage is bound to carry for them as lug-  
gage such things as are usually taken by  
persons travelling. But he is not bound  
to carry articles of another kind, such as  
merchandise, unless he professes to carry  
them, or unless the traveller tenders or is  
ready to pay the customary hire for them.  
And a carrier has a right to limit the weight  
and bulk of that which he professes to carry.  
(Add. Torts, 304; 1 Selw. N. P. 441; Chit.  
& Tem. on Car. 282-3, 286.)

It is the duty of a common carrier to take  
proper care of the goods he carries, and to  
make a safe delivery of them to the consignee

or some person expressly or impliedly authorised by him to receive them ; and to make such delivery at the time agreed, or, in the absence of any stipulation in that respect, within a reasonable time. (Sm. Merc. Law, 288 ; Add. Torts, 319 ; 1 Selw. N. P. 441 ; Chit. & Tem. on Car. 34, 86, 89, 91, 291.)

PART III.  
TIT. III.  
CAP. III.

At common law a carrier is in the nature of an insurer. And the law, independently of any contract, renders every common carrier responsible for loss by any events but acts of God and enemies of the Queen, even by robbery. By the term 'act of God,' is meant something independent of the act of man ; such as storms, gusts of wind, lightning, inundations, sudden death or illness, and inevitable accidents not resulting from human agency. If the danger or the accident has been occasioned otherwise than by the act of God or of the Queen's enemies, the carrier is responsible for the non-delivery of the goods, although the danger or accident may have been unavoidable, and there may have been no negligence on his part. (Add. Torts, 306-7 ; Broom Com. 791-2 ; Chit. & Tem. on Car. 34-44, 154 ; 2 Ste. Com. 83 ; Selw. N. P. 442, 444.)

Responsi-  
bility of car-  
riers of  
goods.

A common carrier of passengers only, who

PART III. receives occasionally and gratuitously, and at  
TIT. III.  
CAP. III. his own option, some article of luggage for  
— the accommodation of a passenger, is only answerable as a gratuitous bailee of such articles, and not as a common carrier of goods. This is the case with an omnibus proprietor. (Add. Torts, 308.)

If things are intrusted to a common carrier, which, from their intrinsic value or their destructible nature, require peculiar care, but the carrier is not apprised of that fact, he is bound only to take that ordinary care of the things which their general appearance seemed to require. (Add. Torts, 309; Chit. & Tem. 10, 49, 50.)

In consequence of the Carriers Act, 11 Geo. IV., & 1 Will. IV. c. 68, no common carrier by land is liable for loss or injury to gold or silver, plated articles, precious stones, jewellery, watches, clocks, trinkets, bills, notes or securities, stamps, maps, writings, pictures, glass, china, silks (which do not include silk dresses made up for wearing), furs, or lace, when the value exceeds 10*l.*; unless the value is declared at the time of delivery to the carrier, and the increased charge for care, notified in the office of such carrier, or an engagement to pay it, shall

have been accepted by the person receiving the parcel. This Act, however, does not protect any such common carrier from liability to answer for loss or injury resulting from the felonious acts of any servant in his employ, or protect the servant himself. The carrier must, if required, give a receipt for the amount paid for the carriage. But he is not concluded, as to the value of any parcel, by the value declared. (Broom Com. 794; 2 Ste. Com. 85; Chit. & Tem. on Car. 47-8, 56; Selw. N. P. 447-9.)

PART III.  
TIT. III.  
CAP. III.  
—

Carriers cannot, by a public notice, limit their liability at common law to answer for the loss of any articles other than those enumerated in the Carriers Act. (Sm. Merc. Law, 291; 2 Ste. Com. 84; Add. Torts, 310; Chit. & Tem. on Car. 60, 63, 77, 79; 1 Selw. N. P. 448.)

A carrier may, however, enter into a special contract limiting his liability, or even throwing the entire risk on the owner, notwithstanding the negligence of himself or his servants; though he may not stipulate for more than reasonable charges. (Chit. & Tem. on Car. 60, 63, 77-80; Selw. N. P. 450; Sm. Merc. Law, 293.) But railway and canal companies are liable for loss

PART III. or injury occasioned by the negligence or  
TIT. III.  
CAP. III. default of such companies or their servants,  
— notwithstanding any notice, condition, or  
declaration, made or given by such companies, contrary thereto, or limiting such liability. The company, however, may make such conditions as the court or judge before which any question relative thereto shall be held, shall deem just and reasonable. And the company will not be answerable in more than a certain sum for certain animals, unless notice be given that they are of higher value, and an increased sum be paid for them. And no special contract between the company and any other party shall be binding upon them, unless signed by him or by the person delivering the property. (Sm. Merc. Law, 294-5; Add. Torts, 317; Chit. & Tem. on Car. 70-2, 79.)

A carrier may enter into a special contract as to the carriage of articles of the value of upwards of 10*l.*, at the ordinary rate, and on the terms of a limited responsibility. (Add. Torts, 314-5; Chit. & Tem. 77.)

When a common carrier receives a parcel addressed to a place beyond the limits of his customary journey, and he does not expressly limit his responsibility to his cus-

tomary journey, he is responsible for the whole distance, though he may have forwarded the goods by another carrier. And this rule applies to railways. (Add. Torts, 320; Chit. & Tem. on Car. 23, 88, 128.)

PART III.  
TIT. III.  
CAP. III.

Every carrier of passengers for hire is answerable for the least want of forethought or care in himself or his servants and agents, and for any accident arising from the defectiveness of his conveyance or equipments, but not for unforeseen misfortunes which forethought and care could not have prevented. (Add. Torts, 238-40; Chit. & Tem. on Car. 256-8, 264-8.)

Responsi-  
bility of  
carriers of  
passengers.

If the driver of a railway engine drives at a dangerous speed, or any accident arises from the defectiveness of the engines, carriages, rails, or works, or from negligence or unskilfulness, or the want of anything necessary for the safety of the passengers, the railway company is responsible for all damages and injuries which the passengers may sustain. (Add. Torts, 239-40; Chit. & Tem. on Car. 257.)

Responsi-  
bility of rail-  
way com-  
panies in  
cases of  
accident.

Railway companies are responsible for the conduct of their servants in regard to passengers' luggage, and for its safe delivery into the hands of the passenger or his agent.

Responsi-  
bility of rail-  
way com-  
panies for  
luggage.



**PART III.** or servant, unless they are expressly ex-  
**TIT. III.** emptied by their special Acts of Parliament.  
**CAP. III.**

— Thus, the company are responsible for luggage delivered to one of their servants that it may be labelled and placed in the luggage van ; and the company's responsibility will continue until the porters have placed the luggage, at the end of the journey, on the vehicles by which it is to be taken away, unless the passenger accepts a shorter delivery, or the porter was specially employed by the passenger to convey the luggage to the vehicle. (Add. Torts, 322 ; Broom Com. 803-4 ; Chit. & Tem. on Car. 287 ; 1 Selw. N. P. 445.)

**Duty of a  
ferryman.**

A common ferryman is answerable for any neglect in providing proper means for the safe transit of persons and their carriages, horses, and goods. (Add. Torts, 324.)

**Definition of  
an innkeeper.**

A common innkeeper is one who professes to supply lodgings and provisions for the night, for all comers who are ready to pay for it ; whether his house is called an inn or a coffee-shop. But a person who professes to let private lodgings only, or to supply provisions only, is not an innkeeper. (Add. Torts, 326 ; 2 Selw. N. P. 1367 ; 2 Ste. Com. 83.)

A common innkeeper is bound to afford such accommodation as he possesses for all travellers, and for the horses and goods of all travellers, who are ready to pay the customary charges, and are not intoxicated, or guilty of impropriety of conduct, or suffering under a contagious or infectious disease; and if he does not, he is liable to an action for damages, and also to an indictment. But he is not bound to receive the goods of a person who merely desires to use the inn as a place of deposit. (Add. Torts, 325-6; 2 Ste. Com. 83.)

PART III.  
TIT. III.  
CAP. III.  
Duty of an  
innkeeper.

An innkeeper is responsible for the goods of any traveller who puts up at his inn as a guest, when they are damaged, stolen, or lost; unless he prove that the loss or damage was attributable to the guest himself, or to the act of God, or to vis major, and was not attributable to any negligence on his part. (Add. Torts, 327-32; 2 Ste. Com. 82; Broom Com. 789; 1 Sm. L. C. 106-8; Jones Bail. 94; 2 Selw. N. P. 1367.)

Liability of  
an innkeeper.

If a guest negligently leaves money or valuables in rooms of common resort, the innkeeper is not responsible for their safety. (Add. Torts, 331; 1 Sm. L. C. 107-8.)

If an innkeeper takes charge of goods for

**PART III.** a person who is not lodging at the inn at  
**TIT. III.**  
**CAP. III.** all, or is lodging there as a lodger, and not as  
 — a traveller and guest, the innkeeper is only  
 responsible in the first case as a bailee, and  
 in the second case as a lodging-house keeper.  
 (Add. Torts, 331-2 ; Broom Com. 789 ;  
 1 Sm. L. C. 109.)

**Duty of a**  
**lodging-**  
**house keeper.** A lodging-house keeper is bound to take  
 that degree of care of his house, and of the  
 property of his lodger in it, and to use that  
 degree of caution in the choice of his ser-  
 vants, which a prudent housekeeper would  
 ordinarily take and use. (Add. Torts, 333 ;  
 Broom Com. 790.)

**Damages.** In actions against common carriers for  
 refusing to carry a passenger or goods, or for  
 delay in delivering goods, or against inn-  
 keepers for refusing to provide accommoda-  
 tion for a traveller, substantial damages are  
 recoverable for the injury to the plaintiff's  
 right ; and if he has been put to expenses  
 in consequence of the refusal or delay, all  
 such expenses are also recoverable. And  
 special damages may be claimed for more  
 than ordinary injury arising from the refusal  
 or delay, unless the plaintiff, though he knew  
 that such injury might arise, did not warn  
 the carrier of it. (Add. Torts, 342-3 ; Chit.  
 & Tem. on Car. 56.)

**PART IV.**

**OF THE ENFORCEMENT OF PRIVATE RIGHTS, AND  
THE REDRESS OF, AND PROTECTION FROM,  
PRIVATE WRONGS OR CIVIL INJURIES.**

## PRELIMINARY REMARKS.

PART IV. It is a maxim that *damnum absque injuria* is not actionable.

*Damnum  
absque in-  
juria.  
Damnum.*

*Damnum* is such a damage, whether pecuniary or perceptible, or not, as is capable, in legal contemplation, of being estimated by a jury.

*Injuria.*

*Injuria* is a legal wrong, that is, an act or omission of which the law takes cognisance as a wrong.

Hence the meaning of the maxim is, that loss or detriment is not a ground of action, unless it is the result of a species of wrong of which the law takes cognisance.

*Injuria sine  
damno.*

Nor is *injuria sine damno* a sufficient ground of action, if *damnum* be understood in the technical sense above mentioned. But if *damnum* be taken in the sense of an actual perceptible loss in the particular case, *injuria sine damno* may be a ground of action. For an action may be maintained for a legal wrong, though unaccompanied, in the parti-

cular instance, with any actual perceptible PART IV. or appreciable loss or detriment.

Thus, *injuria sine damno* will form a ground of action when a private legal right is violated, though the violation of it be unattended with any actual perceptible or appreciable loss or detriment in the particular case. (See *Broom Com.* 72, and cases given 82-90.)

The result is, that there are moral wrongs for which the law gives no legal remedy, though they cause great loss or detriment; and, on the other hand, there are legal wrongs for which the law does give a legal remedy, though there be only a violation of a private right, without actual loss or detriment in the particular case.

Some rights are founded in contract; others are independent of contract. And some wrongs consist of a violation of contract, express or implied; others are infringements of rights, or violations of duty, independent of contract. The latter are termed torts. (*Broom Com.* 633, 652-3, 826-8.)

Division of rights and wrongs, into those founded in contract, and those independent of contract.

The same transaction may be a breach of contract, a tort, and a crime. And accordingly, when it does not amount to a felony, redress may be obtained, first, by an

Transactions which have a contractive, a tortious, and a criminal aspect.

ART IV. action ex contractu, when it may be viewed as a breach of contract ; or, secondly, by an action ex delicto, when it may be viewed as a tort ; or, thirdly, by an indictment, when it may be viewed as a crime. In the first case the plaintiff is said to sue or recover in contract ; in the second case, in tort. (See Broom Com. 652-3, 827. And see p. 282, *infra*.)

Responsi-  
bility for  
consequences  
of tort.

Every person who does a wrong, is at least responsible for all the mischievous consequences that might reasonably be expected to result under ordinary circumstances from such misconduct. (Broom Com. 667.)

# T I T L E I.

OF THE ENFORCEMENT OF RIGHTS, AND THE  
REDRESS OF AND PROTECTION FROM  
WRONGS, BY THE MERE ACT OF THE PARTIES,  
OR BY THE MERE OPERATION OF LAW.

I. THERE are two modes in which private PART IV.  
TIT. I.  
injuries are prevented by a mere personal  
act; namely, defence, and stoppage in tran- I. Prevention  
of wrong by  
a mere per-  
sonal act.  
situ.

1. The defence, even by force, of oneself, or the Defence.  
mutual and reciprocal defence of such as stand  
in the relations of husband and wife, parent  
and child, master and servant, is a preventive  
course which the law allows; and the breach  
of the peace which results is chargeable upon  
him who began the affray. But care must  
be taken that the resistance does not exceed  
the bounds of mere defence and prevention;  
for then the defender would himself become  
an aggressor. (3 Bl. Com., quoted 3 Ste.  
Com. 338.)

2. Stoppage in transitu is the resumption Stoppage in  
transitu.  
by a vendor of the possession of goods which  
have been transmitted to, but have not yet  
come into the actual or constructive posses-



PART IV. sion of, a purchaser who has become insol-  
 TIT. I. vent. The vendor is not obliged to seize  
 — the goods on the road. Notice to the carrier  
 is sufficient. (Sm. Merc. Law, 553-4, 559,  
 562; Tudor's Ca. on M. L. 549.)

II. Redress  
 by the act of  
 the parties.

II. Redress of private injuries by the mere  
 act of the parties is of two sorts: first, that  
 which arises from the act of the injured  
 party; and, secondly, that which arises from  
 the joint act of both or all the parties.

I. Redress by  
 act of the in-  
 jured party.

1. Of redress by the act of the injured party,  
 there are several modes: recaption or reprisal,  
 entry on lands, abatement or removal of  
 nuisances, distress, and seizure.

(1) Recap-  
 tion.

(1) Recaption or reprisal is the recovery,  
 by the act of the party deprived, of his pro-  
 perty in goods or chattels personal, or of his  
 wife, child, or servant. This personal reco-  
 very is allowable, provided it be not in a  
 riotous manner, or attended with a breach of  
 the peace or a violation of legal rights. If,  
 therefore, my horse is taken away, and I find  
 him in a common, a fair, or a public inn, I  
 may lawfully seize him to my own use; but  
 I cannot justify breaking open a private  
 stable, or entering on the grounds of a third  
 person, to take him, except he be feloniously  
 stolen, but must have recourse to an action.  
 (Bl. Com., quoted 3 Ste. Com. 338-9.)

(2) A remedy of the same kind, for injuries to real property, is, by entry on lands, when another person, without any right, has taken possession of them; in which case the party entitled may make a formal but peaceable entry on the lands, declaring that he thereby takes possession. He may enter on any part in the same county, declaring it to be in the name of the whole; but if the lands are in different counties, he must make a distinct entry in each county. If, however, a person enters with a strong force or with violence, or if he forcibly detains after a peaceable entry, unless there has been three years' peaceable enjoyment under such entry, the magistrate may restore possession to the party put out. (Bl. Com., quoted 3 Ste. Com. 339-40.)

PART IV.  
TIT. I.  
(2) Entry.

(3) Another species of remedy by the mere act of the party injured, is the abatement or removal of nuisances, whether public or private. (Bl. Com., quoted 3 Ste. Com. 338; Broom Com. 224-5.)

(3) Abatement of nuisances.

If a man apprehends that a nuisance will be committed, he has no right to enter upon his neighbour's land to prevent it, but he may make a peaceable entry to abate and put a stop to an existing private nuisance,

PART IV. The occupier should, however, first be re-

TIT. I.  
—

quired to abate it himself, unless the nuisance causes such imminent danger to life as to render it unsafe to wait for its removal by the occupier. And a public nuisance cannot be abated by a private individual; unless it injures him in some peculiar manner, distinct from that in which the public generally are affected by it; in which case he may abate it so far as may be necessary to the enjoyment of his own rights. (Add. Torts, 99-101; Gibbon, 401; Broom Com. 224-7.)

Excessive  
exercise of a  
limited right.

The exercise of a limited right, when used to excess so as to produce a nuisance, may, if necessary, be entirely stopped, until confined within its proper limits. (Add. Torts, 101.)

(4) Distress

(4) Another mode of redress by the mere act of the parties is by distraining. A distress is usually made either for rent in arrear, or for damage feasant, that is, for damage done. (Bl. Com., quoted 3 Ste. Com. 339.)

for rent.

Of distress for rent we have already spoken.

Distress for  
damage  
feasant.

An owner or occupier of land may seize animals and chattels injuring or trespassing upon his land, and detain them until a fair compensation for the injury is tendered to him, unless they are under the personal care and the immediate control of some one. But

he must distrain them at the time, and before they leave his land. If, however, the trespassing of cattle is owing to the fault of the owner of the land, in not fencing where he ought, and there is no default on the part of the persons in charge of the cattle, no distress can be made. (Add. Torts, 372-3; 3 Ste. Com. 341; Gilbert, 24.)

PART IV.  
TIT. I.  
—

Tender of sufficient amends before the distress makes the distress wrongful; the remedy for which is by replevin, or action for a trespass, or for the wrongful seizure and conversion of the things. Tender of sufficient amends after distress, and before the things are impounded (that is, put into a place of security) for the purpose of the distress, makes the detainer wrongful, for which an action will lie for the detention of the goods. The demand of an exorbitant sum for a compensation does not exempt the person whose goods are seized from the necessity of tendering a proper compensation. (Add. Torts, 365, 374-5, 379; Tomlin's Law Dict.; Wharton's Law Lex.)

Persons impounding animals must feed them, and may either recover from the owner not more than double the value of the food, or, after seven days, and after three days' further public notice, may sell them, or

**PART IV.** one or some of them, as may be necessary, to  
**TIT. I.** defray the cost of their food. (5 & 6 Will.  
 IV. c. 59; 12 & 13 Vic. c. 92; 17 & 18 Vic.  
 c. 60.)

A commoner may distrain the beasts of a stranger; because there is no colour of right. But he cannot distrain the beasts of another commoner; because there is a colour of right. If, however, one commoner puts more cattle on the common than he ought, he is liable to an action by one or more of the other commoners. (Add. Torts, 62; Gilbert, 21.)

(b) Seizing of  
heriots and  
things lying  
in franchise.

(5) The seizing of heriots, when due on the death of a tenant, and of certain things said to lie in franchise, as waifs, wrecks, estrays, is another species of self-remedy analogous to distress for rent. (Bl. Com., quoted 3 Ste. Com. 352.)

2. Redress by  
the joint act  
of the parties.

2. In addition to these remedies by the mere act of the party injured, there are two remedies by the joint act of both or all the parties; namely, accord and satisfaction, and arbitration. (Bl. Com., quoted 3 Ste. Com. 353.)

(1) Accord  
and satisfac-  
tion.

(1) Accord is an agreement between the party injuring and the party injured, that the party injuring shall make satisfaction to the injured party, by doing something in lieu of some other thing which the former had failed to do; and satisfaction is the fulfil-

ment of such agreement. But the taking a smaller sum of money in lieu of a greater does not amount to a legal satisfaction, unless the time or place of payment of the smaller sum is different from that of the debt. (See Bl. Com., quoted 3 Ste. Com. 344-5.) So that a man may give in satisfaction of a debt of 100*l.* a horse worth 5*l.*; but if he gives 5*l.*, it is not a satisfaction. (3 Ste. Com. 353; Broom Com. 422-3.)

PART IV.  
TIT. I.  
—

(2) Arbitration is the determination of a matter in dispute by a person or persons appointed for that purpose. In some cases, a single arbitrator is appointed: in other cases, two or more arbitrators are appointed; and it is provided that, if they should not agree, another person shall be called in, as umpire, to whose sole judgment the matter shall be referred.

The decision in any of these cases must be in writing, and is called an award. Though the submission to arbitration may be by word or by deed, yet, both of these being revocable in their nature, it became the practice to enter into mutual bonds, with condition under a penalty to stand to the award or arbitration. (Bl. Com., quoted 3 Ste. Com. 354-6.)

Real property cannot pass by a mere

PART IV. award ; but an arbitrator may award a conveyance or release of real estate, and it will  
TIT. I. be a breach of the arbitration bond to refuse compliance.

The parties may agree that their submission of a matter which is the subject of an action or suit, shall be made a rule of any of the Courts of Record, and may insert such agreement in their submission or promise or the condition of the arbitration bond. And where the subject-matter of an action involves matters of account which cannot be conveniently tried in the ordinary way, the Court or Judge may order it to be referred, either to an arbitrator appointed by the parties, or to an officer of the Court, or, in country causes, to the Judge of the County Court. If an award has been obtained by undue means, or the arbitrators or umpire have been guilty of misbehaviour, it may be set aside ; but, unless set aside, an award is final and conclusive, and, upon an action or other proceeding to enforce it, no objection to its validity can be made, except in respect of a defect on the face of the award itself. And after the submission has been made a rule of Court, a party disobeying the award may be punished as for a contempt of Court, unless it be set aside. (3 Ste. Com. 356-8.)

III. The remedies for private wrongs effected by the mere operation of law are two; retainer and remitter.

PART IV.  
TIT. I.

III. Redress  
by the opera-  
tion of law.

1. Retainer.

1. Retainer is the retaining or paying himself, by a creditor who is executor or administrator to his debtor. The law allows such creditor to retain so much as will pay himself, before paying any other creditors whose debts are of equal degree; on the ground that the executor or administrator cannot, without an apparent absurdity, commence a suit against himself, as representative of the deceased, to recover that which is due to him in his private capacity. (Bl. Com., quoted 3 Ste. Com. 359.)

2. Remitter takes place where he who has the right of entry in lands, but is out of possession, afterwards obtains the possession of the lands by some subsequent and of course defective title; in which case he is remitted or sent back, by operation of law, to his ancient and more certain title. The possession which he has gained by a bad title, is, ipso facto, annexed to his own inherent good one; because otherwise he who has the right would be deprived of all remedy; for, as he himself is in possession of the land, there is no other person upon whom he can make entry. (3 Ste. Com. 360-1; Tomlin's Law Dict.)

2. Remitter.



## TITLE II.

OF THE ENFORCEMENT OF RIGHTS, AND THE  
REDRESS OF, AND PROTECTION FROM,  
WRONGS, BY THE COURTS.

## CHAPTER I.

## OF THE DIFFERENT COURTS.

PART IV. It is not proposed to treat of the constitution,  
 TIT. II. pleadings, or practice of the various Courts.  
 CAP. I.

Classification  
 of the dif-  
 ferent courts.

But it may be useful, in this place, to enu-  
 merate and classify the different Courts,  
 before we proceed to speak of their inter-  
 position.

The Courts, then, may be divided into  
 three classes: 1. Courts of general jurisdic-  
 tion. 2. Courts of peculiar jurisdiction.  
 3. Courts of local jurisdiction.

1. Some of the Courts of general jurisdic-  
 tion are Courts of Law, others are Courts of  
 Equity, others are Courts both of Law and  
 Equity.

The Courts of Law are the Court of Exchequer, the Court of Common Pleas, which is sometimes called the Court of Common Bench, the Court of Queen's Bench, the Courts of Assize and Nisi Prius, and the Court of Exchequer Chamber, which is a Court of Appeal.

PART IV.  
TIT. II.  
CAP. I.

---

The Court of Chancery has also a jurisdiction at law in some few matters. And the House of Lords is the Supreme Court of Appeal at Common Law.

Formerly the Court of Exchequer had general equitable jurisdiction; but now the only Courts of Equity of general jurisdiction are the Court of Chancery and the House of Lords, which is the Supreme Court of Appeal in Equity, as well as at Law.

2. The Courts of peculiar jurisdiction are the Court of Bankruptcy, the Court of Probate, the Court for Divorce and Matrimonial Causes, the Ecclesiastical Courts, and the Admiralty Court; and to this class may also be referred the Judicial Committee of the Privy Council, which is chiefly an Appellate Court in colonial, ecclesiastical, and maritime causes. The Court Military or Court of Chivalry has fallen into disuse.

3. The Courts of local jurisdiction now

**PART IV.** practically subsisting are the County Courts,  
**TIT. II.** the Court of the Duchy Chamber of Lancaster,  
**CAP. I.** the Courts of the Counties Palatine of Lancaster and Durham, the Court for the Stannaries of Cornwall and Devon for the administration of justice among the miners; the Borough Courts, that is, the various Courts of limited jurisdiction held in London and other cities and boroughs, and the University Courts. (As to each of these several Courts, see 3 Ste. Com. And see an elaborate Tabular View of all the Courts in England and Wales, for the recovery of debts, in Trower's Law of Debtor and Creditor.)

Courts to the  
interposition  
of which the  
following  
pages are  
confined.

In the following pages, we shall limit ourselves to the subject of the interposition of the Courts of Common Law of general jurisdiction, of the Court of Bankruptcy, and of the County Courts.

## CHAPTER II.

OF THE INTERPOSITION OF THE COURTS OF  
COMMON LAW OF GENERAL JURISDICTION.

WITH the exception of their criminal juris- PART IV.  
TIT. II.  
CAP. II.  
diction, and their administration of the law  
of real property, and the jurisdiction of the  
Court of Exchequer in matters of revenue, Of what the  
practice of  
the Common  
Law Courts  
consists.  
the whole business of our Common Law  
Courts may be arranged under two heads—  
contracts and torts. (Sm. Cont. 1.)

## SECTION I.

*Of Actions.*

An action is the ordinary mode of enforcing An action  
defined.  
a legal private right, or of redressing a legal  
private wrong, in a Court of Common Law.

Where any law requires the performance Where an  
action may be  
maintained.  
of an act for the benefit of another, or forbids  
that which may prejudice another, though  
the law give no action expressly, yet the  
party injured by the violation of the law is  
nevertheless entitled to an action. But an

**PART IV.** action will not lie for the infringement of a  
**TIT. II.** right created by a statute which provides  
**CAP. II.** another remedy for such infringement.  
**SEC. I.** (Broom Com. 650.)

**False representation.** If a representation is made by a person, knowing it to be false, or having no ground to believe it to be true, with an intention that another person should believe it and act upon it, and that person has acted upon it, and thereby suffered damage, it is a fraud, even though the party telling the falsehood had no interest in telling it; and he is responsible in damages in an action for deceit. (Add. Torts, 632; Broom Com. 660.)

**Injury to a right.** Whenever an act done would be evidence against the existence of a right, that is an injury to the right; and an injury to a right imports a damage for which an action will lie. (Add. Torts, 62, 72; Broom Com. 86.)

**Responsibility for accident or misfortune.** He who has done or been the immediate cause of an injury, though it happened accidentally or by misfortune, is answerable for it. (Add. Torts, 237.)

**Joint tortfeasors.** Where two or more persons are liable to be jointly sued for an injury resulting from their common act, each is responsible for the entire injury. (Add. Torts, 430.)

**Negligence of the plaintiff.** A person cannot sue for an injury of which the negligence of himself or his servants has

been the proximate cause. But although there may have been negligence on the part of the plaintiff, yet, unless he might by ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover. (Add. Torts, 95; Broom Com. 103, 667.)

PART IV.  
TIT. II.  
CAP. II.  
SEC. I.

The remedy for a public or common nuisance is by indictment. And no one can have an action for an injury from a public nuisance, unless he has sustained some particular damage to himself, distinct in its nature from the general injury to the public. And the plaintiff in such a case sues for that damage, and not for the breach of duty. (Add. Torts, 103-4; Broom Com. 93-5, 638, 642, 694.)

Injury from  
a public  
nuisance

Where a person is under an agreement to do an act at a future time, and in the meantime he does an inconsistent act which renders him incapable of performing his agreement, he is liable to an action as soon as he does such inconsistent act. (See Broom Com. 107.)

Action on an  
agreement to  
do an act at a  
future time.

If Judges and judicial officers of Courts of superior jurisdiction exceed their authority, and thereby cause injury to another, they are amenable to an action for damages; unless they have a *primâ facie* jurisdiction in

Liability of  
judicial  
officers.

PART IV. the matter, and had not the knowledge of  
 TIT. II. their want of actual jurisdiction, or means of  
 CAP. II. knowledge of that fact of which they ought  
 SEC. I. to have availed themselves. But if the  
 — act done is within their authority, though  
 based on an erroneous judgment, they are  
 not liable to an action. (Add. Torts, 457-9;  
 Broom Com. 99, 102, 702-3.)

Where the  
 wrong done  
 is both a tort  
 and a felony.

Where an act is done which is both a  
 tort and a felony, the civil remedy by action  
 for the tort is suspended, in order that the  
 justice of the country may be first satisfied  
 by criminal proceedings in respect of the  
 felony. But if the wrong-doer is acquitted  
 of the felony, he may then be subjected to  
 an action for the tort. (Broom Com. 97-8.)

Liability of  
 infants for  
 torts and  
 crimes.

An infant is liable to an action for a tort  
 unconnected with contract. (2 Ste. Com.  
 314; Add. Tort. 729.)

Division of  
 actions.

Actions used to be divided into three  
 classes — real, personal, and mixed. Real  
 actions, which relate to real property, were, by  
 the st. 3 & 4 Will. IV. c. 27, reduced to three  
 — writ of right of dower, dower unde nihil  
 habet, and quare impedit; and by the  
 Common Law Procedure Act, 1860, these  
 writs are abolished, and the plaintiff who  
 wishes for the relief formerly sought by

them, may commence his action by writ of summons in an ordinary action, and on such writ indorse a notice that he intends to declare in dower, or for free bench, or in quare impedit, as the case may be. Mixed actions were also abolished, except the action of ejectment, which is termed by some a mixed action, and by others a real action. (See Broom Com. 113; 3 Ste. Com. 447-8, 481.)

PART IV.  
TIT. II.  
CAP. II.  
SEC. I.  
—

Personal actions are those which are brought for the recovery of goods and chattels, or for damages in respect of breaches of contract, or in respect of torts.

Personal  
actions.

Personal actions are divided into—1st, actions *ex contractu*, or of contract, in which the cause of action springs directly out of, or is founded upon, contract; and 2nd, actions *ex delicto*, or of tort, in which the cause of action is founded upon a wrong, independent of contract. (Broom Com. 113-4; Sm. Action, 42-3; 3 Ste. Com. 449.)

Actions of contract are divisible into *assumpsit* (which is included by some in trespass on the case), debt, covenant, account, and *scire facias*. Detinue is classed by some writers among actions on contract, but by others it is treated as an action on tort, and will be so considered in a subsequent page.

Actions *ex*  
*contractu*.



PART IV. (Broom Com. 114; Sm. Action, 44; Selw.  
 TIT. II. N. P. 660; 3 Ste. Com. 449.)  
 CAP. II.

SEC. I.

Action of  
 assumpsit, or  
 on promises.

On a breach of a promise made verbally, or made in writing, but other than by deed, and on breach of a promise implied, but not on a deed, an action on the case, upon the assumpsit or undertaking of the defendant, which is called an action of assumpsit, or, more commonly, an action on promises, may be brought for the recovery of damages in respect of the breach of such promise. But where the promise is by deed, an action of assumpsit will not generally lie, because an action of covenant is then the proper remedy. And to support an action of assumpsit, it is essential that the promise should be founded on a sufficient consideration, such as that of benefit to the defendant or a stranger, or of damage or loss sustained by the plaintiff at the request of the defendant. (3 Bl. Com. 158, 162; 3 Ste. Com. 453, 520; Selw. c. 4; Sm. Action, c. 3; Sm. Cont. 423-4.)

The implied contracts on which an assumpsit is usually brought are these: 1. An implied contract to pay for work done, services rendered, or materials supplied. This is called an assumpsit on a quantum meruit. 2. An implied contract to pay a person for

goods bargained and sold, or goods sold and delivered. The assumpsit in this case is called quantum valebat. 3. An implied contract to hand over to a person money recovered for his use. 4. An implied contract to repay money lent to another, or money expended for him. 5. An implied contract to pay money due on an account stated. The assumpsit in this case is called an assumpsit on an insimul computassent, because it proceeds on the fact that the parties had settled their accounts together. 6. An implied contract on the part of a person who undertakes any employment, trust, or duty, that he will perform it with integrity, diligence, and skill. (3 Bl. Com. 158, 162-6; Selw. N. P. 43, 69; Wms. on Plead. 51-2; Sm. Action, 45; Broom Com. 114.)

PART IV.  
TIT. II.  
CAP. II.  
SEC. I.

If a matter of record renders a sum certain payable by the one party to the other, payment may be enforced either by an action of debt or by a scire facias. (Sm. Cont. 423.) And whenever a sum which is ascertained, or capable of being ascertained by calculation, is due on simple contract, or on bond or other specialty, or in some other way, in respect of a direct and immediate

Action of  
debt.

**PART IV.** liability by a debtor to a creditor, such sum  
**TIT. II.** may be recovered by an action of debt, which  
**CAP. II.** is only applicable to the recovery of the  
**SEC. I.** specific amount due, with nominal damages  
 for its detention, and not for the recovery of  
 damages in respect and in lieu of the sum  
 due. (3 Bl. Com. 154-5 ; 3 Ste. Com. 449 ;  
 Sm. Action, c. 3 ; Selw. N. P. c. 13 ; Broom  
 Com. 115 ; Sm. Cont. 423.)

**Action of  
 account.**

The action of account is almost obsolete ;  
 but the Court or Judge may decide in a sum-  
 mary way matters of account which cannot  
 be conveniently tried in the ordinary man-  
 ner, or order them to be either entirely or  
 partly referred to arbitration ; and the de-  
 cision of the arbitrator may be enforced  
 like the finding of a jury. (Sm. Cont. 424.)

**Action of  
 covenant.**

In the case of a contract expressed in, or  
 implied on, a deed, the remedy is by action  
 of covenant for the recovery of damages  
 proportionate to the injury sustained, unless  
 the contract is for the payment of a liqui-  
 dated sum, when the plaintiff may, if he  
 prefer it, maintain an action of debt.  
 (3 Bl. Com. 156-7 ; 3 Ste. Com. 449 ; Selw.  
 N. P. c. 12 ; Sm. Action, c. 3 ; Sm. Cont.  
 424 ; Broom Com. 119.)

**Scire facias.**

The remedy by writ of scire facias lies

only upon a record, and requires the defendant to show cause why the party bringing it should not have advantage of such record. (Sm. Cont. 422 ; Sm. Action, 239 ; Wharton.)

PART IV.  
TIT. II.  
CAP. II.  
SEC. I.

Actions ex delicto, or founded on tort, are trespass, case, or trover and conversion (which is a species of action of trespass on the case), and replevin. And, as already mentioned, according to the classification adopted by some writers, detinue may be classed with actions on tort. (See references, p. 284, supra.)

Actions ex  
delicto.

In its most extensive sense, trespass signifies any offence against the law, whether divine or human. In a narrower sense, it signifies any injury to person, character, or property, which is redressed by the municipal law. Where an injury to the real or personal property of another, or to his person or character, is caused directly and immediately by the act of the defendant, an action of trespass is the appropriate remedy. But when such an injury is caused immediately and consequentially by the act of the defendant, or where that which is injuriously affected is not corporeal, so that the idea of force is inapplicable, an action of trespass on the case (or 'case,' as it is, for brevity,

Action of  
trespass and  
trespass on  
the case.

**PART IV.** usually called) is the proper remedy. This  
**TIT. II.** was the leading distinction, but it is often  
**CAP. II.** very refined, and difficult of application.  
**SEC. I.** The action of trespass was always for an injury supposed, in contemplation of law, to be accompanied with violence, and for this reason was usually called trespass vi et armis. Redress is obtained in the shape of damages. (Wms. on Plead. 62; 3 Bl. Com. 153, 208; 3 Ste. Com. 450-1; Sm. Action, c. 3; Broom Com. 119-20.)

Where there is only a direct injury to land, the remedy is by an action of trespass; but where there are both a direct injury and a consequential damage to land, the party aggrieved may sue either in trespass or in case. (Broom Com. 752; Sm. Action, 43.)

Trespass for removal of goods.

Where goods have been wrongfully removed, an action may be maintained by the person who was in actual possession of them, or had a constructive possession of them in respect of a vested right to them. This is termed trespass de bonis asportatis. (Add. Torts, 183; Broom Com. 121-2, 776-7.)

Action of trover.

Where a person has wrongfully converted chattels to his own use, either actually or constructively, according to the technical import of the word conversion, the person

who has an absolute or qualified property in them, and has the right of possession as against him, may bring an action of trover; which was originally applicable only to chattels detained by one who had found them or come lawfully to the possession of them, and which is sometimes called an action for conversion, or for trover and conversion. (Broom Com. 121, 771-2.) But the judgment in this action is for the recovery of damages only, equal to the value of the chattels, not for the recovery of the specific chattel. (3 Bl. Com. 152-3; 3 Ste. Com. 515-7; Selw. N. P. c. 38; Mayne, 203.)

PART IV.  
TIT. II.  
CAP. II.  
SEC. I.

The gist of the action of trover does not consist in the wrongful taking, as in the case of trespass de bonis asportatis, but in the conversion. (Broom Com. 776; Mayne, 203.)

A conversion is an asportation of a chattel for the use of the defendant or some other person, or an assertion of right to the dominion over it by the defendant, and a refusal to deliver it up at all, or except on conditions which the defendant has no right to impose, or a wilful destruction of it, or a depriving the owner of it in its original state. (Add. Torts, 183-7; Broom Com. 774-6.)

PART IV. The recovery of judgment in an action of  
 TIT. II. trover operates as a transfer of the property  
 CAP. II. in the goods from the plaintiff to the  
 SEC. I. defendant. (Add. Torts, 219 ; Broom  
 Com. 776.)

Substantial damages are recoverable in trover for wrongfully assuming a dominion over the chattels of another, even though no pecuniary damage may have been sustained. (Add. Torts, 231.)

In actions for the conversion of chattels, the full value of the chattels at the time of the conversion is the measure of the damages, unless special damage, as the necessary consequence of the conversion, has been sustained and is claimed, in which case an amount far exceeding the value of the goods may often be recovered ; or unless goods have been tendered and received back after action, when the plaintiff may proceed in the action for any further damage and his costs. (Add. Torts, 231, 234-5 ; Mayne, 203, 217.)

Action of  
 Replevin.

Replevin is the redelivery or restitution of goods wrongfully taken from any person having absolute or qualified property in them. It is almost exclusively confined in practice, however, to the redelivery of things taken by way of distress for rent

or for damage feasant, that is, damage done.

PART IV.  
TIT. II.  
CAP. II.  
SEC. I.

---

Replevin was formerly effected by the sheriff and his deputies, who were called replevin clerks. But replevin, in the case of distress, is now effected by the high bailiff of the County Court. This redelivery usually takes place before any action is brought for the restitution of the goods. They are redelivered to the owner on his demanding their restitution, as if he had succeeded in an action for that purpose; but he gives a bond with sureties, or makes a deposit of money, to secure the commencement and prosecution of an action of replevin by him, as if they had not been redelivered. This is for the purpose of trying the right to take them, and to secure the return of the goods to the person who took them, in case the taking of them should not appear to have been wrongful.

Upon the action of replevin being brought by the owner (who is called the replevisor), from whom the goods were taken, and to whom they have been redelivered, the defendant, or distreinor, who took the chattels, either makes avowry (i. e. he avows taking the distress, in his own right or in right of



PART IV. his wife, and sets forth the reasons of it, as  
 TIT. II.  
 CAP. II. for rent in arrear, damage done, or other  
 SEC. I. cause); or else he justifies, in right of another person, as the bailiff or servant of such other person; in which case he is said to make cognisance, because he acknowledges the taking, but insists that such taking was legal, as he acted by the command of a person who had a right to distrain. And on the truth or merits of this avowry or cognisance, the cause is determined. (See BL. Com. 145-50; 3 Ste. Com. 510-11; Selw. N. P. c. 32; Chitty's Archb. 1013; Broom Com. 122.)

Action of  
 detinue.

Where chattels are unjustly detained, although the original taking of them was not unlawful, an action of detinue may be brought to recover them, or the value of them. It is necessary, however, that they should be capable of being ascertained with certainty; so that money or corn, not contained in a bag or chest, or otherwise capable of being distinguished from other property of the same kind, cannot be the subject of this action. The plaintiff must have had an absolute or qualified property in them; and the defendant must have come lawfully into possession of them, as either by delivery

of them, or by finding them. The defendant has the option of giving up the chattel, or of paying the value, i. e. the highest price of it in the market at any time during its detention, together with damages for its detention, unless the Court or a Judge, on the application of the plaintiff, orders that execution shall issue for the chattel, and that, if the chattel cannot be found, a distress shall be levied upon the defendant's lands and goods, until he surrenders it, or, at the option of the plaintiff, that the assessed value of the chattel be made by the sheriff of the defendant's goods. (3 Bl. Com. 151; 3 Ste. Com. 513-4; Selw. N. P. 660-3; Sm. Action, 43; Sm. Cont. 418; Wms. on Plead. 238; Broom Com. 117; Add. Torts, 300.)

PART IV.  
TIT. II.  
CAP. II.  
SEC. I.

When a person entitled to land has a right of entry, he may take possession, provided he does so in a peaceable manner without force. But if the right of entry is not clear, or the person in possession is an obstinate man, it is best to proceed by ejectment. (Chitty's Archb. 951; Cole on Eject. 66-71.)

Action of  
ejectment.

An ejectment is the ordinary mode in which the title to lands and tenements is

PART IV. tried (though not conclusively and finally),  
 TIT. II. and the possession recovered, in cases where  
 CAP. II. the party claiming title has a right of entry,  
 SEC. I. whether such title be to an estate in fee, in  
 tail, for life, or for years. An ejectment  
 will not lie for an incorporeal hereditament  
 alone. It was formerly a fictitious pro-  
 ceeding, but the procedure is now en-  
 tirely altered. The plaintiff may recover  
 damages in respect of the mesne profits  
 which the defendant has wrongfully re-  
 ceived. But, except in cases between land-  
 lord and tenant, the plaintiff must bring a  
 separate action of trespass for mesne profits.  
 And he cannot recover any rents and profits,  
 except for the last six years. (Cole, 1-3,  
 77, 91, 634-5; 3 Bl. Com. 199-206; 3 Ste.  
 481, 683-6, 690; Sm. Action, c. 13; Selw.  
 N. P. 691-3, 705; Broom Com. 736-8, 744-5.)

Action of  
 trespass  
 quare clau-  
 sum fregit.

There is one species of action of trespass  
 which may be naturally mentioned here.  
 Every unwarrantable entry on the soil of which  
 another is in possession, whether such entry  
 is by a person himself or by his cattle, and  
 whether it is productive of any actual specific  
 damage or not, is termed a trespass by  
 breaking his close; and the action for this  
 wrong is called an action of trespass quare

clausum fregit; for every man's land is, in the eye of the law, enclosed and set apart from his neighbour's, either by a visible and material fence, or by an invisible ideal boundary, existing only in contemplation of law, as when one man's land adjoins to another's in the same field. (3 Bl. Com. 209; 3 Ste. Com. 487-90; Selw. N. P. 1295; Broom Com. 747.)

PART IV.  
TIT. II.  
CAP. II.  
SEC. I.

In respect of the mere violation of the plaintiff's right, he is entitled to recover at least nominal damages; and in respect of any specific damage, he is entitled to further or special damages. (Broom Com. 747; Mayne, 3, 4.)

To maintain an action of trespass *qu. cl. fr.*, it is necessary that the plaintiff be in actual possession, by himself, whether as owner or as tenant, or by his servant or agent. But a reversioner is not without remedy in respect of a permanent injury to his reversion; for he may sue in case, though not in trespass. (Broom Com. 747, 750; Selw. N. P. 1298; Rosc. Evid. 606-8.)

Where a judgment has been obtained, whether in a matter of contract or in a matter of tort, the cause of action, whether against the same or another party, becomes

Judgment  
operates as a  
merger of the  
cause of  
action.

PART IV. merged and changed into a matter of re-  
 TIT. II. cord ; transit in rem judicatam ; so that, for  
 CAP. II. example, after a judgment recovered against  
 SEC. I. one of two joint debtors, the other cannot  
 be sued, though no satisfaction was obtained  
 from the former. (Broom Com. 262-4.)

Judgment  
 an estoppel.

By a final judgment inter partes, they are estopped or prevented from again litigating the matter. But those who are neither party nor privy to it will not be affected, except where it relates to public matters. Nor will it be of any avail where it is given by a person who is interested, or where it has been obtained by fraud. (Broom Com. 265-6 ; Rosc. Evid. 157-60.)

General  
 remarks on  
 damages.

In addition to the remarks already made on damages, in the course of the preceding pages, some further general observations on the same subject may here be added.

General and  
 special  
 damages.

Damages are either general or special. General damages are such as the law implies. Special damages are such as have actually been sustained. (Broom Com. 823 ; Mayne, 315.)

Measure of  
 damages.

All questions of damages are for the jury ; but it is the province of the Judge to direct them to award damages according to certain established rules, so far as they are applicable. (See Pow. Evid. 240-1 ; Mayne, 337.)

In general, a Court will not disturb a verdict, where there is no certain measure of damages. But if the jury give damages in respect of matters extraneous to the case, or there is some error in law, or unquestionable mistake in calculation, or gross misconduct of the jury, or the damages are grossly excessive or inadequate, a new trial will be granted. (Pow. Evid. 257; Mayne, 343-7.)

PART IV.  
TIT. II.  
CAP. II.  
SEC. I.  
—

Damages will be given in every case for a breach of a contract; but where no loss is sustained, they will be only nominal. (Pow. Evid. 252; Broom Com. 607.)

Damages in  
actions of  
contract.

Where on breach of an agreement an ascertained sum is to be paid, that sum, together with interest when recoverable, will be the measure of damages, unless the circumstances are such as to lead the Court to the conclusion that such sum is really a penalty, though expressed to be a sum payable by way of liquidated, that is, ascertained damages, and not by way of penalty. But circumstances which tend to extenuate the defendant's conduct, or to throw the blame partly on the plaintiff, will be taken into account in mitigation of damages. (Broom Com. 607-12; Pow. Evid. 241, 268, 271; Mayne, 65-8.)

**PART IV.** Where a person makes a contract, and  
**TIT. II.** breaks it, he must pay the whole damage na-  
**CAP. II.** turally resulting, that is, resulting from such  
**SEC. I.** a breach in a great majority of similar cases.  
But ordinarily he will not be liable for more.  
And if the loss is a natural consequence of  
the breach by reason of special circumstances,  
it must in general be shown that they were  
known to the defendant. (Broom Com.  
612-3, 625, 629 ; Pow. Evid. 242-7 ; Mayne,  
6-8, 14 et seq.)

In an action for non-delivery or for non-acceptance of goods, stock, or shares, purchased, but not paid for, and not delivered, or not accepted, as the case may be, the measure of damages is the difference (if any) between the stipulated price and the price for which they might have been bought at the time of the breach of contract ; so that, if there is no such difference, nominal damages only will be recoverable. But, on proof that time, trouble, and expense have been occasioned, the measure of damages may be increased. (Broom. Com. 614-6 ; Pow. Evid. 242-3 ; Mayne, 6, 78-81.)

In an action by a purchaser for breach of a contract to sell real estate, when the sale goes off for want of a good title, the damages are limited to the expenses ; but when the sale

goes off because the vendor has changed his mind, or otherwise by his fault, full compensation is given. (Broom Com. 621-2; Pow. Evid. 244; Mayne, 11, 12, 91-4.)

PART IV.  
TIT. II.  
CAP. II.  
SEC. I.

In an action by a vendor against a purchaser of real estate who refuses to complete, where no conveyance has been executed, the vendor can only recover the damages actually sustained by the breach of the contract. As he retains the land, he cannot have the purchase-money also. (Broom Com. 623; Pow. Evid. 245; Mayne, 94-5.)

In determining the amount of damages to be awarded for breach of a contract, the motive or animus of the defendant is disregarded, except in those cases in which the breach of contract is in the nature of a tort. In such cases (as in cases of breach of promise of marriage) high damages may be recovered without proving any substantial injury. (Broom Com. 606-7; Pow. Evid. 252; Mayne, 10.)

In actions of tort, the damages are, in general, simply by way of compensation; but the jury may take into account the feelings of the party injured, and, in some cases, the animus of the wrong-doer, as well as circumstances of aggravation or mitigation; and in some cases damages are given which may be

Damages in  
actions of  
tort.



**PART IV.** regarded as penal. Such damages are termed  
**TIT. II.** exemplary or vindictive. (Broom Com.  
**CAP. II.** 816-23; Pow. Evid. 256, 271; Add. Torts,  
**SEC. I.** 178; Mayne, 12-14.)

In an action of tort, damages naturally and not too remotely resulting from the tortious act, may be recovered. (Broom Com. 92, 824; Add. Torts, 178; Mayne, 14 et seq.)

Limitation  
of actions in  
the case of  
land or rent;

An action or suit to recover any land or rent (existing as an inheritance distinct from the land) can only be brought within twenty years next after the time at which the right to bring such action or suit shall have first accrued. (3 & 4 Will. IV. c. 27, s. 2.) But if a person is under disability of infancy, coverture, unsoundness of mind, or absence beyond the seas, at the time the right first accrued to him, he and those claiming through him have ten years from the termination of such disability or his death, notwithstanding the expiration of the twenty years. But no entry, distress, or action can be made or brought but within forty years from the first accruer of the right. (s. 16, 17.)

In the case  
of a mort-  
gage;

A mortgagor is barred at the end of twenty years from the time when the mortgagee took possession, or from the last written acknowledgment. (Id. s. 28.)

No land or rent can be recovered by any

ecclesiastical or eleemosynary corporation PART IV.  
TIT. II.  
CAP. II.  
SEC. I.  
sole after two incumbencies and six years, or  
such further time as will make up sixty years  
from the accruer of the right. (Id. s. 29.)

No benefice can be recovered after three  
adverse incumbencies, or such further period  
as will make up sixty years, or after a hun-  
dred years' adverse possession. (Id. s. 30,  
33.)

No proceeding can be brought, to recover  
any sum of money secured by any mortgage,  
judgment, or lien, or otherwise charged upon  
or payable out of any land or rent, or any  
legacy, or the personal estate or a share of  
the personal estate of an intestate possessed  
by his legal personal representative, but  
within twenty years next after a present right  
to receive the same shall have accrued to  
some person capable of giving a discharge  
for or release of the same, unless in the mean-  
time some part of the principal money, estate,  
or share, or some interest thereon, shall  
have been paid, or some acknowledgment  
of the right thereto shall have been given in  
writing, signed by the person by whom the  
same shall be payable, or his agent, to the  
person entitled thereto or his agent; and in  
such case no such proceeding shall be brought  
but within twenty years after such payment

in the case  
of an eccle-  
siastical or  
eleemosy-  
nary corpo-  
ration sole ;  
in the case o  
a right of  
presentation  
or advow-  
son ;

in the case of  
money  
charged upon  
or payable  
out of land  
and legacies ;

PART IV. or acknowledgment, or the last of such  
 TIT. II.  
 CAP. II. payments or acknowledgments if more than  
 SEC. I. one, was given. This, however, does not apply  
 ————— to cases of express trust. (3 & 4 Will IV.  
 c. 27, s. 40; 23 & 24 Vic. c. 38, s. 13.)

in the case  
 of dower;

No arrears of dower, nor any damages on account of such arrears, can be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit. (3 & 4 Will. IV. c. 27, s. 41.)

in the case  
 of arrears of  
 rent, &c.;

No arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears, can be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent. (Id. s. 42.)

in the case  
 of trespass,  
 detinue,  
 trover, re-  
 plevin, and  
 simple con-  
 tract;

Actions of trespass for assault, menace, wounding, and imprisonment, must be brought within four years; actions on the case for verbal slander within two years; and other actions of trespass for injuries to the

person, or to land, or to personal property, and actions of detinue, trover, replevin, or account, and actions of trespass on the case (except for verbal slander), and actions for arrears of rent on a demise without deed, and other actions on simple contract whether in assumpsit or debt, within six years after the cause of action accrued, or after the removal of the disability, in the case of any person entitled to sue being an infant, or a married woman, or non compos, at the time when the cause of action accrued, or after the return of a person liable to be sued being at the time beyond the seas.

PART IV.  
TIT. II.  
CAP. II.  
SEC. I.

But the protection of the statute, in cases of debt, is removed, if the defendant has given an acknowledgment in writing, signed by him or his agent, in such terms as not to preclude the court from inferring a promise to pay. And part payment of principal or interest may take the case out of the statute.

Actions of debt for rent upon any indenture of demise, or of covenant or debt on any bond or other specialty, must be brought within twenty years after the cause of action accrued, or after the removal of the disability, in the case of a person entitled to sue being an infant, a married woman, or non compos ;

in the case  
of debt for  
rent, or cove-  
nant, or debt  
on any spe-  
cialty ;

**PART IV.** or after the return of the defendant, if abroad;  
**TIT. II.**  
**CAP. II.** or from the date of an acknowledgment of a  
**SEC. I.** debt in writing, signed by the defendant or  
 his agent, or from a part payment of principal or interest. (3 Ste. Com. 546-50; Sm. Cont. 425, 434-5, 452; Sm. Action, 47; Selw. N. P. 29, 153, 163, 166, 557, 629, 1060, 1267, 1302, 1371.)

**In other cases.**

Actions and suits, in certain other cases, are also subjected to statutes of limitation. (See 3 Ste. Com. 550-1.)

## SECTION II.

### *Of Proceedings other than by Action.*

**Proceedings other than by actions.**

Besides actions, there are some other modes in which the interposition of the Courts of Common Law is obtained.

**Motions.**

Motions, in most cases, are incidental to an action; but in some cases they are applications to the Court for an order, called a rule, directing some act to be done in favour of the applicant, without being in any manner connected with an action, in cases in which there is no other remedy than by way of motion. (3 Ste. Com. 694-6; Broom Com. 229-30.)

By the common law, if a third party brought an action of detinue against a de-

positary, he might pray garnishment, that is, PART IV.  
TIT. II.  
CAP. II.  
SEC. II.  
that the depositor might be garnished or  
warned of the claim, and summoned; and  
then he was substituted, under the name Garnish-  
ment.  
of garnishee, as defendant, in the place of  
the depository. (Add. Torts, 292.)

And, by recent enactments, where an action Interpleader.  
is brought against depositaries, stakeholders,  
sheriffs, or other officers, in execution of the  
process of the Courts, and there are other  
claimants besides the plaintiff, the Court may  
order such other claimants to state the par-  
ticulars of their claims, and may do justice  
in the matter. (Add. Torts, 293; Broom  
Com. 238-40; Sm. Action, 25-7.)

A mandamus is of two kinds: first, the Mandamus.  
common law or prerogative writ of manda-  
mus; and secondly, a mandamus incidental  
to an action. The former is principally used  
to enforce performance of public rights or  
duties, where no other specific legal remedy  
exists. (3 Ste. Com. 697-8; Wharton; Tap-  
ping, 9.) The latter depends on a modern  
enactment, by which the plaintiff in any  
action in the superior Courts of Common Law,  
except replevin or ejectment, may have a  
peremptory writ of mandamus to the de-  
fendant, commanding him to perform any  
duty in the fulfilment of which the plain-

**PART IV.** tiff is personally interested; and this, in  
**TIT. II.** case of disobedience, may be enforced by  
**CAP. II.** attachment. But the Court may, upon the  
**SEC. II.** application of the plaintiff, besides or instead  
 of proceeding against the disobedient party  
 by attachment, direct that the act required to  
 be done may be done by the plaintiff, or some  
 other person appointed by the Court, at the  
 expense of the defendant, payment of which  
 may be enforced by execution.

But this only applies to cases of duty  
 arising under a statute or royal charter, in  
 which the public as well as the plaintiff are  
 interested, and not to cases of mere private  
 or personal contract. (Sm. Cont. 416-7,  
 420-1; 3 Ste. 702; Broom Com. 123, 230.)

**Injunction.** A person may claim an injunction at law  
 against the repetition or continuance of a  
 breach of contract or any other injury, in  
 respect of which he has brought an action,  
 or against the committal of any breach of  
 contract or injury of the like kind, arising  
 out of the same contract, or relating to the  
 same property or right; and such injunction  
 may be enforced by attachment. (Sm. Cont.  
 418-9; Archb. Pr. 1051; Broom Com. 123.)

**Prohibition.** A prohibition is a writ issuing out of a  
 superior Court, and requiring that the pro-  
 ceedings in an inferior or pretended Court

should be either conditionally stayed or peremptorily stopped, on the ground that such Court has either no jurisdiction in the matter or has exceeded its jurisdiction. (Broom Com. 234 ; 3 Ste. Com. 702-3.)

PART IV.  
TIT. II.  
CAP. II.  
SEC. II.

The proceedings of inferior Courts of Record are removable, by writ of certiorari, into the Court of Chancery, or some superior Court of Common Law, as the case may be.

Certiorari.

If a cause has been improperly removed, the superior Court may issue a writ of procedendo, commanding the inferior Court to proceed; or the writ of certiorari may be quashed on motion. (3 Ste. Com. 721; Broom Com. 239-40.)

Procedendo.

There are various kinds of habeas corpus for removing prisoners from one Court to another, for the more easy administration of justice. Such is the habeas corpus ad respondendum, for the removal of a prisoner from an inferior Court, in order to charge him with a new action in the Court above. Such also are those ad prosequendum, testificandum, deliberandum, &c., which issue when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any other Court, or to be tried in the proper jurisdiction where the fact was committed. And such is the common writ ad faciendum et

Habeas corpus.



PART IV. recipiendum, which issues out of any of the  
TIT. II. Courts of Westminster Hall, when a person  
CAP. II. is sued in some inferior jurisdiction, and is  
SEC. II. desirous to remove the action into the superior Court, commanding the inferior Judge to produce the body of the defendant, together with the day and cause of his caption and detainer, (whence the writ is frequently denominated a *habeas corpus cum causâ*), to do and receive whatever the superior Court shall consider in that behalf. (Bl. Com., cited 3 Ste. Com. 711.)

But the most important species is the *habeas corpus ad subjiciendum*, which is the remedy used for the deliverance from illegal confinement. This is directed to any person who detains another in custody, and commands him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, to submit to, and receive, whatever the Judge or Court awarding the writ shall consider in that behalf.

This existed at common law; but the right to it has been formally declared, and the procedure regulated, by certain statutes, particularly the famous Habeas Corpus Act, 31 Car. II. c. 2, and the stat. 56 Geo. III. c. 100 — the former relating to illegal con-

finement for criminal or supposed criminal matters; the latter to illegal confinement in other cases, except for debt or by process in any civil suit. This writ issues out of any of the superior Courts at Westminster, including the Court of Chancery; and it is granted on motion, yet not as of course, but on showing probable cause, inasmuch as, when once granted, the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner. The return to it is made by producing the prisoner, and setting forth the grounds and proceedings upon which he is in custody. If this return presents sufficient matter to justify the detention, the prisoner is remanded to his former custody; if insufficient, he is discharged. (Bl. Com., cited 3 Ste. Com. 712-21; Broom Com. 247-50.)

PART IV.  
TIT. II.  
CAP. II.  
SEC. II.

By the statute 25 & 26 Vic. c. 20, it is enacted, that no writ of habeas corpus shall issue out of England, by authority of any Judge or Court of justice therein, into any colony or foreign dominion of the Crown, where Her Majesty has a Court of justice having authority to issue the writ, and to insure the due execution thereof throughout such colony or dominion.

## CHAPTER III.

OF THE INTERPOSITION OF THE COURT OF  
BANKRUPTCY.

PART IV. In this chapter an attempt\* is made to give  
TIT. II. such points in the statutory Law of Bank-  
CAP. III. ruptcy as are the most necessary or useful to  
— be known and remembered. They may be  
arranged under the following heads:—

I. The Court generally; the written law by which it is governed; and its officers.

II. Persons liable to be bankrupts.

III. Acts of Bankruptcy.

IV. The adjudication, and the proceedings before and after it, generally.

V. A judgment debtor summons.

VI. The appointment of assignees, their rights and duties.

VII. The property which vests in the assignees.

\* In this the writer derived assistance from the work of Mr. Hazlitt and Mr. Roche, and that of Mr. Nicol, on the Bankruptcy Acts.

VIII. The bankrupt's duties, liabilities, and protection.

PART IV.  
TIT. II.  
CAP. III.

---

IX. The examination of the bankrupt and other persons.

X. The proof of debts, and payments in full.

XI. The dividend.

XII. The discharge.

XIII. Transactions affected or not affected by the bankruptcy.

XIV. Suspending bankruptcy proceedings, and winding up the estate as the creditors may think fit.

XV. The change from bankruptcy to a deed of arrangement, subject to the approval and control of the Court.

XVI. Winding up a debtor's estate under a deed of composition, subject to the jurisdiction of the Court, where no bankruptcy proceedings have been taken.

XVII. Offences against the Bankrupt Law.

XVIII. Miscellaneous matters.

## SECTION I.

PART IV. *Of the Court generally; of the Written Law*  
 TIT II.  
 CAP. III. *by which it is governed; and of its Officers.*  
 SEC. I.

Two great  
 Bankruptcy  
 Acts.

The statutory Law of Bankruptcy depends principally on two statutes—the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vic. c. 106, and the Bankruptcy Act, 1861, 24 & 25 Vic. c. 134.

Formerly,  
 two Courts  
 for adjusting  
 affairs of  
 debtors.

Until the latter of these statutes, there were two distinct Courts, which were exclusively occupied in adjusting the affairs of persons who were unable to meet their pecuniary engagements; namely, the Court of Bankruptcy, and the Court for the Relief of Insolvent Debtors. The former took cognisance of the affairs of traders; the latter of non-traders.

Abolition of  
 Insolvent  
 Debtors'  
 Court.

By the Bankruptcy Act, 1861, the latter Court was abolished, and traders and non-traders are alike subjected to the jurisdiction of the Court of Bankruptcy. (s. 1, 19, 20.)

Jurisdiction  
 of the  
 Court.

The Court of Bankruptcy is only authorised to deal with that which clearly constitutes the bankrupt's estate, and not to decide what is the bankrupt's estate. If that question is a

legal one, it is tried at law ; if equitable, in a Court of Equity. (Sup. to Selw. N. P. 214.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. I.

The Court of Bankruptcy consists of certain Commissioners in London and in the country ; with a treasurer, called the Accountant in Bankruptcy, whose office is to cease on his death ; a taxing officer, who is called the Master of the Court ; and a staff of registrars, official assignees, and messengers. But, by the Act of 1861, the jurisdiction of the country commissioners may be transferred by the Queen in Council to the county court judges, where the office of a sole commissioner of any district becomes vacant. (s. 3, 4.)

Constitution  
and powers  
of the Court  
of Bank-  
ruptcy.

The Court of Bankruptcy has all the powers of the superior courts of law and equity. (Act of 1861, s. 1.) And each and every commissioner, singly, simultaneously, or otherwise, as occasion may require, forms the Court. (Act of 1849, s. 6.)

The registrars of the Court of Bankruptcy have power to make adjudication of bankruptcy ; to receive a bankrupt's surrender ; to grant protection ; to pass the last examination of a bankrupt, when the assignees and creditors do not oppose ; to hold and preside at meetings of creditors ; to audit and pass accounts of assignees ; and to sit in chambers

Registrar's  
powers and  
duties.

PART IV. and despatch certain parts of the administra-  
 TIT. II. tive business of the Court, and uncontested  
 CAP. III. matters. But they may not commit, or hear  
 SEC. I. a disputed adjudication or any question of  
 the allowance or suspension of an order of  
 discharge. And a registrar may adjourn any  
 matter for the consideration of the com-  
 missioner. (Act of 1861, s. 52.)

The Court of Bankruptcy may direct a registrar to attend at any place within the district, for the prosecution of any bankruptcy or other proceeding under the Act of 1861, and the registrar so acting may exercise all powers, except the power of commitment, for the summoning and examination of persons or witnesses, and for requiring the production of books, papers, and documents. Depositions and examinations, and all acts done by him, must be reduced to writing, and be signed by him. (Act of 1861, s. 58.)

Transmis-  
 sion of copies  
 of entries,  
 adjudica-  
 tions, &c., to  
 chief regis-  
 trar.

Registrars acting in the country must transmit daily by post, to the chief registrar, copies of all entries made by them in their docket-books, and of all adjudications in the district courts; and the chief registrar must forthwith cause them to be entered in the general docket-book; and when any petition in prosecution or any adjudication is dismissed

or annulled, or when the time allowed for proceeding is extended, he must transmit a certified copy thereof to the chief registrar. (Act of 1849, s. 95.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. I.

The high bailiffs of the county courts having jurisdiction in bankruptcy discharge the duties of messengers. (Act of 1861, s. 11.)

Messengers' duties discharged by high bailiffs of county court.

Every solicitor admitted as a solicitor of the Court of Bankruptcy, may appear and plead, without being required to employ counsel; and in case any person not being such solicitor practise in the Court as a solicitor, he will be deemed guilty of a contempt of Court, and will be liable to all the penalties incident thereto. (Act of 1861, s. 212.)

Solicitors of the Court may appear and plead without counsel.

## SECTION II.

### *Of Persons liable to be Bankrupts.*

As a general rule, all persons engaged in any business, as distinguished from a profession, whether learned or otherwise, and not merely those who are enumerated in the statute of 1849, might, and still may, be bankrupts as traders. (See Roche & Haz. 75.) But farmers, graziers, common labourers, or workmen for hire, or members of or sub-

Who are, and who are not, traders.



PART IV. scribes to an incorporated commercial or  
 TIT. II. trading company established by charter or  
 CAP. III. Act of Parliament, are not traders within the  
 SEC. II. meaning of the Bankrupt Law. (Act of  
 1849, s. 65.)

Where non-traders are not adjudged bankrupts. No debtor who is not a trader may be adjudged bankrupt, except in respect of some one of the acts of bankruptcy described as applicable to non-traders. (Act of 1861, s. 69.)

Trader having privilege of Parliament. A trader having privilege of Parliament may be dealt with as any other trader, except that he cannot be arrested or imprisoned, save for felony or misdemeanor. (Act of 1849, s. 66.)

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### SECTION III.

#### *Of Acts of Bankruptcy.*

Certain acts of bankruptcy in the case of traders. Some of the acts of bankruptcy, in the case of a trader, are these: departing from the realm, absenting himself, beginning to keep his house, yielding himself to prison, fraudulent outlawry, arrest, attachment, execution, or transfer of property, with intent to defeat or delay creditors. (Act of 1849, s. 67.)

A man is said to absent himself when he keeps away from a creditor, or from his abode

or place of business, or some other place, where, but for fear of arrest, he would otherwise have been. (Sup. to Selw. N.P. 235.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. III.

A man is said to begin to keep house when he secludes himself in his house from his creditors. (Sup. to Selw. N.P. 236-7.)

The question whether a gift is fraudulent and an act of bankruptcy within the meaning of the Bankrupt Acts, may be answered by reference to the following rules:—1. Any transfer which is fraudulent within the meaning of the statute of Elizabeth, is also fraudulent and an act of bankruptcy under the Bankrupt Acts. 2. Any conveyance to a creditor by a trader of his *whole property*, or of the whole with an exception only nominal, in consideration of a bygone and pre-existing debt, though not fraudulent within the statutes of Elizabeth, is fraudulent under the Bankrupt Acts, and an act of bankruptcy. 3. A transfer by a trader of *part* of his property to a creditor, in consideration of a bygone and pre-existing debt, though not fraudulent within the statutes of Elizabeth, is fraudulent and an act of bankruptcy within the Bankrupt Acts, if made *voluntarily and in contemplation of bankruptcy*. 4. A trans-

PART IV. fer by a trader of part of his property, in  
 TIT. II. consideration of a past debt, is fraudulent, if  
 CAP. III. its effect is to stop the business *and* produce  
 SEC. III. insolvency. (Sup. to Selw. N. P. 239-40.)

Where a transfer of part of a trader's property is both voluntary and also in contemplation of bankruptcy, the combination of these circumstances constitutes what is commonly called *fraudulent preference*. The meaning of the word 'voluntary' is, that the transfer *originated* in the voluntary act of the trader, and not in consequence of the creditor's asking for it. (Sup. to Selw. N. P. 248-9.)

Non-traders. Going or remaining abroad, or making any fraudulent transfer of property, to defeat or delay creditors, is an act of bankruptcy in the case of non-traders. But before an adjudication is made against the debtor, in respect of these acts of bankruptcy, a copy of the petition for adjudication must be served on the debtor, with a memorandum indorsed on it, specifying the time for the debtor's appearing on the petition. If personal service cannot be effected, the Court must be satisfied that every reasonable effort was made to effect the same, and that the attempts to serve came to the knowledge of the debtor,

and were defeated by his conduct. (Act of 1861, s. 70.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. III.

If an execution is levied by seizure and sale of any of the effects of a trader-debtor for the recovery of a debt or money-demand exceeding 50*l.*, it is an act of bankruptcy. Yet, unless in the meantime a petition for adjudication be presented, the officer must proceed with the execution, and must pay the proceeds, or so much as ought to be paid, to the execution creditor. But if the debtor is adjudged a bankrupt within fourteen days from the sale, the execution creditor must pay over the money to the assignees, after deducting the costs and expenses of his action and execution. (Act of 1861, s. 73.)

Execution  
by seizure  
and sale of  
the effects of  
a trader.

If a trader executes a conveyance or assignment by deed of all his estate and effects to a trustee or trustees for the benefit of all his creditors, the execution of such deed is not to be deemed an act of bankruptcy, unless a petition for adjudication be filed within three months from the execution of the deed; provided it be executed by the trustee or trustees within fifteen days after the execution of it by the trader, and the execution by the trader and by the trustee or trustees be attested by a solicitor, and notice of it be

Conveyance  
or assign-  
ment for the  
benefit of  
creditors of  
a trader.

PART IV. given in the newspapers within one month  
 TIT. II. after its execution. (Act of 1849, s. 68.)  
 CAP. III.

SEC. III.

Debtor,  
 whether  
 trader or  
 non-trader,  
 lying in  
 prison,

or escaping  
 out of prison.

If a debtor, whether trader or not, is committed to prison for debt, or on an attachment for non-payment of money, and upon such or any other arrest or commitment for debt or non-payment of money, or upon any detention for debt, lies in prison, being a trader, for fourteen days, or, being a non-trader, for two calendar months; or if, having been arrested for any cause, he so lies in prison after any detainer for debt lodged against him and not discharged, he is to be deemed to have committed an act of bankruptcy. And if, having been arrested, committed, or detained for debt, a debtor escapes, he is to be deemed to have committed an act of bankruptcy from the time of such arrest, commitment, or detention; but no debtor is to be adjudged bankrupt on the ground of having lain in prison, unless he fails to give security for the debt in respect of which he is imprisoned or detained. (Act of 1861, s. 71.)

Debtor filing  
 a declaration  
 of insol-  
 vency.

If a debtor, whether a trader or not, files a declaration, signed by him and attested by a registrar or a solicitor, that he is unable to meet his engagements, he is to be deemed to have committed an act of bankruptcy, pro-

vided a petition for adjudication be filed by or against him within two months. (Act of 1861, s. 72.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. III.

If a trader pays money to the petitioning creditor, or gives or delivers to him any satisfaction or security for his debt or any part of it, whereby he may receive more in the pound in respect of his debt than the other creditors, it is an act of bankruptcy; and if adjudication shall have been made under such petition, the Court may either declare it valid, or may order it to be annulled, and a new petition may be filed, supported by that or any other act of bankruptcy. (Act of 1849, s. 71.)

Trader giving the petitioning creditor more than the other creditors.

The filing of a petition by or against a debtor, whether a trader or not, in any Court for the relief of insolvent debtors in insolvency or bankruptcy in any of Her Majesty's dominions, and the adjudication on such petition, are conclusive evidence of an act of bankruptcy; and any creditor whose debt is of sufficient amount to petition, may petition for adjudication of bankruptcy against such debtor. (Act of 1861, s. 75.)

Adjudication on a petition filed abroad.

If a creditor of a trader having privilege of Parliament, to an amount requisite to support a petition for adjudication, files an

Trader having privilege of Parliament not paying, or securing, or

**PART IV.** affidavit that the debt is due, and that the  
**TIT. II.** debtor is a trader, and sues out a writ of  
**CAP. III.** summons, and serves the debtor with a copy,  
**SEC. III.** there, if the trader does not pay, secure, or  
 compound for the debt, or enter into a bond  
 to pay such sum as shall be recovered in the  
 action, and cause an appearance to be entered  
 in the action, it is an act of bankruptcy.  
 (Act of 1849, s. 77.)

compound-  
 ing for his  
 debt.

Trader not  
 paying,  
 securing, or  
 compound-  
 ing for his  
 debt after  
 summons.

If a creditor of a trader files an affidavit of the truth of the debt, and of the debtor being a trader, and of the delivery of an account, with a notice requiring immediate payment, the Court may issue a summons, calling upon the trader to appear before the Court. (Act of 1849, s. 78.) Upon his appearance, the Court may require him to state whether or not he admits the demand, and, if so, to reduce his admission into writing, which he must sign, and the Court may allow the trader to make a deposition upon oath, in writing under his hand, that he believes that he has a good defence upon the merits; and in such case, the Court may require the trader to enter into a bond to pay such sum as shall be recovered, with the costs. (Act of 1849, s. 79.) But if the trader does not appear, though he has no

lawful impediment, or if he refuses to admit the demand, and does not make such a deposition and enter into such bond, there, if the trader does not pay, secure, or compound for the demand, or enter into a bond to pay such sum as shall be recovered in an action, he is to be deemed to have committed an act of bankruptcy, provided a petition for adjudication is filed against him within two months from the filing of the affidavit. (Act of 1849, s. 80.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. III.

If the trader signs and files an admission of the demand, and does not pay or tender, or secure, or compound for the same, he is to be deemed to have committed an act of bankruptcy, provided a petition for adjudication is filed against him within two months from the filing of the affidavit. (Act of 1849, s. 81.)

If the trader signs an admission for part only of the demand, and does not make a deposition that he believes he has a good defence upon the merits to the residue, and, if required, enter into a bond to pay such sum as shall be recovered, there, if he does not pay, or tender, or secure, or compound for the sum so admitted, and, as to the residue, does not pay, secure, or compound



PART IV. for the same, or enter into a bond to pay  
 TIT. II. such sum as shall be recovered, he is to be  
 CAP. III. deemed to have committed an act of bank-  
 SEC. III. ruptcy, provided a petition for adjudication is  
 filed against him within two months from the  
 filing of the affidavit. (Act of 1849, s. 82.)

Act of bank- No person is liable to become bankrupt  
 ruptcy more by reason of any act of bankruptcy com-  
 than twelve mitted more than twelve months prior to  
 months be- the filing of a petition for adjudication.  
 fore petition. (Act of 1849, s. 88.)

#### SECTION IV.

##### *Of the Adjudication, and the Proceedings before and after it, generally.*

Mode of ob- Proceedings to obtain adjudication are  
 taining ad- by petition, on the oath of the petitioner.  
 judication, (Act of 1861, s. 87.)  
 and its effects.

Who may A petition for adjudication may be filed  
 petition for either by a creditor, or by a debtor against  
 adjudication. himself; and where a petition is filed  
 by a debtor against himself, it is an act of  
 bankruptcy. (Act of 1861, s. 86.) And in  
 such case he must file a statement on  
 oath of his debts and liabilities, creditors,  
 and causes of his inability to meet his  
 engagements. (Act of 1861, s. 93.)

The Court, under a petition filed by a creditor, must, upon proof of the debt and of the trading and act of bankruptcy, adjudge the debtor bankrupt.

PART IV.  
TIT. II.  
CAP. III.  
SEC. IV.

Adjudication  
under ordi-  
nary circum-  
stances.

After the filing of the petition in the case of a debtor petitioning against himself, and after adjudication in the case of a petition filed against a debtor, the bankrupt personally and all his estate and effects become subject to the law of bankruptcy. (Act of 1861, s. 87.)

When the  
debtor and  
his estate be-  
come subject  
to the bank-  
rupt law.

The amount of the debt of a creditor petitioning for adjudication is as follows:—  
The debt of a single creditor, or of two or more partners, must amount to 50*l.*; the debt of two creditors to 70*l.*; the debt of three or more creditors to 100*l.* (Act of 1861, s. 89.) The petitioning creditor's debt must be recoverable both at law and in equity. (Sup. to Selw. N. P. 262.)

Amount of  
debt of peti-  
tioning  
creditor.

Where a debtor petitions against himself, and believes that his debts do not exceed 300*l.*, such fact must be stated on oath; and if he is resident within the metropolitan district, he must file his petition in the London Court of Bankruptcy, and, if elsewhere, in the county court for the district. (Act of 1861, s. 94.)

Where a  
petition by a  
debtor  
against him-  
self (he not  
owing 300*l.*)  
is to be filed.

**PART IV.** If the petitioning creditor does not obtain  
**TIT. II.** adjudication, the Court may, upon the peti-  
**CAP. III.** tion of any other creditor, to the amount  
**SEC. IV.** required to constitute a petitioning creditor,  
 proceed to adjudication on such last-men-  
 tioned petition. If a debtor petitioning  
 against himself does not obtain adjudication,  
 the Court may adjudge the debtor a bank-  
 rupt on the petition of any competent  
 creditor. (Act of 1861, s. 96; Act of 1849,  
 s. 101, 103.)

Adjudication  
 on the peti-  
 tion of a  
 creditor,  
 after a peti-  
 tion by an-  
 other credi-  
 tor or by the  
 debtor him-  
 self.

**Adjudication against debtor petitioning in forma pauperis.** A debtor imprisoned for a debt or demand may petition in forma pauperis, upon affidavit sworn before the gaoler, that he has not the means of paying the usual fees and expenses. (Act of 1861, s. 98.) He may then be brought up to the County Court to be examined, when an order of adjudication may be made, and an order of protection granted. (Act of 1861, s. 99.)

The gaoler of every prison in which any person is confined by reason of any debt or demand, is bound to make a monthly return of the name of every such person, and the date of his imprisonment, and the nature and amount of the debt or demand, and his willingness, refusal, or inability to petition the Court of Bankruptcy, and the names and

addresses of every creditor at whose suit such prisoner is imprisoned or detained. (Act of 1861, s. 100.) The Court must then order a registrar to attend at the gaol, and, notice of the order having been given to the gaoler and to the execution and detaining creditors, the registrar must examine every prisoner included in such return who shall have been in prison, being a trader, for fourteen days, or, not being a trader, for two calendar months, as to his estate and effects, debts, dealings, and transactions. The registrar may make an order of adjudication against every such prisoner, and grant him protection, and make an order for his release, certifying the particulars of each case to the Court. (Act of 1861, s. 101.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. IV.  

---

If the prisoner refuses to appear, or be sworn, or to answer all lawful questions respecting his debts, liabilities, and transactions, or to make a full discovery of his estate and effects and of his books of account, or to produce the same, or to sign his examination, the Court may commit him to the common gaol, to be kept, with or without hard labour, for not more than a month, and may adjudge him bankrupt. (Act of 1861, s. 102.) The adjudication will, unless

PART IV. otherwise directed, have relation back to the  
 TIT. II. date of detention or commitment. (Act of  
 CAP. III. 1861, s. 103.) No person imprisoned under the  
 SEC. IV. stat. 8 & 9 Vic. c. 107, and 9 & 10 Vic. c. 95,  
 by reason of any order or judgment, wherever  
 there shall have been recovered a sum for  
 debt not exceeding 20*l.*, may be included in  
 the return, or be released by the registrar,  
 or be entitled to petition in forma pauperis.  
 (Act of 1861, s. 104.)

Notice to  
 gaoler.

A debtor who presents a petition for adjudication, whilst a prisoner, must give notice in writing to the keeper of the prison of his intention so to do, and must in his petition state that such notice has been given. (Act of 1861, s. 95.)

Where a  
 debtor is of  
 unsound  
 mind.

If two medical practitioners, after separately examining a debtor who is in prison, certify, and if a magistrate from his own view is satisfied, that such debtor is of unsound mind, the magistrate is to certify the same to the Court, and thereupon the Court may appoint some person to represent the debtor, and direct proceedings to be taken for adjudication against him. (Act of 1861, s. 106.) He may then be sent to the county asylum, and dealt with as a pauper lunatic. But in the event of his recovery, he must, if still

liable to be detained as a debtor, be remitted to the gaol. (Act of 1861, s. 107.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. IV.

Before notice of an adjudication, and at or before the time of putting in execution a warrant of seizure, a duplicate of the adjudication must be served on the debtor, who may show cause against its validity. And if he shows that the petitioning creditor's debt, or the trading or act of bankruptcy, is insufficient to support the adjudication, and if a debt, trading, or act of bankruptcy is proved on the part of another creditor, such adjudication is to be annulled. But if no cause shall have been shown, notice must be given of such adjudication in the London 'Gazette.' (Act of 1849, s. 104.)

Showing  
cause against  
adjudication.

After adjudication, the Court appoints a meeting of the creditors. At this a registrar or some other person appointed by the Court must preside, and receive the proofs of the debts; and the official assignee must give information of the bankrupt's estate and effects, and of his debts. The majority in number and value of the creditors present may then determine that the proceedings be prosecuted in the county court of any district other than the metropolitan district. And a majority in value of the creditors present

First meet-  
ing after ad-  
judication.

**PART IV.** must determine whether any and what  
**TIT. II.** allowance for support shall be made to the  
**CAP. III.** bankrupt, up to the time of passing his last  
**SEC. IV.** examination. (Act of 1861, s. 109.)

**Search-war-  
rant for  
bankrupt's  
property.**

Where there is reason to believe that property of the bankrupt is concealed in any place not belonging to him, the Court may grant a search-warrant. (Act of 1849, s. 106.)

**Powers of  
the officers  
acting under  
a warrant.**

The officers acting under a warrant can break open any house, warehouse, door, or chest of the bankrupt, where he or any of his property may be reputed to be, and seize upon his body or property. (Act of 1849, s. 109.)

**Agreement  
to make a  
man a bank-  
rupt.**

No petition for adjudication can be dismissed, nor any adjudication reversed, merely on the ground that the same or an act of bankruptcy has been concerted between the bankrupt and any creditor or other person. (Act of 1849, s. 115.)

**Death of  
bankrupt.**

If a bankrupt dies after adjudication, the Court may proceed as if he were living. (Act of 1849, s. 116.)

**Appoint-  
ment of a  
public sit-  
ting for the  
last exami-  
nation.**

The Court must, forthwith after the meeting for the choice of a creditors' assignee, appoint a public sitting, for the bankrupt to pass his last examination, and make application for his discharge. (Act of 1861, s. 140.)

The Court may adjourn the last examination of the bankrupt sine die, and in such case he will be free from arrest or imprisonment for such time as the Court may appoint. (Act of 1849, s. 162.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. IV.

Adjournment of last examination.

During the proceedings before a registrar, any party may take the opinion of the Commissioner or Judge upon any point arising, or on the result of the proceedings, which must be stated by the registrar in the shape of a short certificate. This is signed by the Commissioner or Judge, if he approves, or may be discharged or varied by him. (Act of 1861, s. 53.)

Taking the opinion of the Commissioner or Judge upon the Registrar's certificate.

In case of any claim, dispute, or difference, either party may apply to the Court to determine the same; but a resolution by a majority in number and value of the creditors may not be varied or set aside by the Court, unless inequitable. (Act of 1861, s. 136.)

Decision of disputed points.

In any stage of the proceedings, any question may be stated in a special case for the opinion of the Court, which shall be final, unless it be agreed and stated in the case that either party may appeal. (Act of 1861, s. 56.) And the parties may agree that, upon the question being so decided, a sum of money or any debt or claim shall be paid, delivered, or transferred. (Act of 1861, s. 57.)

Taking the opinion of the Court on a special case.



## SECTION V.

*Of a Judgment-debtor Summons.*

PART IV.     A judgment creditor, who is entitled to sue  
TIT. II.     out a *capias ad satisfaciendum*, or to charge  
CAP. III.   a debtor in execution in respect of any debt  
SEC. V.     amounting to 50*l.*, is entitled to sue out a  
Judgment-  
debtor  
summons.   judgment-debtor summons, requiring him to  
appear and be examined respecting his ability  
to satisfy the debt. (Act of 1861, s. 76.) And  
where a decree or order of a court of equity,  
or an order in bankruptcy or insolvency or  
lunacy, directing the payment of money, is  
disobeyed, and the debtor does not pay the  
money, or secure, or tender, or compound  
for it, the creditor is entitled to sue out a  
judgment-debtor summons. (Act of 1861,  
s. 77.)

If the debtor is keeping out of the way to  
avoid service of the summons, the Court may  
order notice to be inserted in the newspapers,  
requiring him to appear. (Act of 1861, s. 81.)  
Upon his appearance, he may be examined  
on oath respecting his ability to satisfy the  
debt, and for the discovery of property  
applicable in that behalf, and will be bound  
to produce any documents relating to such

property, and to sign his examination when reduced into writing. (Act of 1861, s. 82.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. V.

If, after service of the summons, or after notice of it, the debtor does not pay, secure, or compound for the debt and costs, the Court may adjudge him bankrupt; and where he has not appeared, notice of the adjudication must be served upon him. (Act of 1861, s. 83.) If the debtor appears, and shows sufficient cause against the adjudication, it may be annulled, otherwise it will become absolute; and notice of it is to be given in the London 'Gazette,' and the adjudication will have relation back to the service of the summons, or the insertion of the first notice in the London 'Gazette,' as the case may be. (Act of 1861, s. 84.)

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#### SECTION VI.

##### *Of the Appointment of Assignees, their Rights and Duties.*

Forthwith after adjudication, the Court will appoint an official assignee. (Act of 1849, s. 102.)

Appoint-  
ment of offi-  
cial as-  
signees.

PART IV. Immediately on adjudication, the official  
TIT. II. assignee should take possession of the bank-  
CAP. III. rupt's estate, and, unless not requisite for the  
SEC. VI. protection of the creditors, should retain  
possession, until the appointment of a cre-  
ditors' assignee. (Act of 1861, s. 108.) But he  
may be ordered to dispose of property of a  
perishable nature, or property the holding  
possession of which would be prejudicial to  
the bankrupt's estate. (Act of 1849, s. 46.)

Official as-  
signee tak-  
ing posses-  
sion.

Choice of  
assignees. At the first meeting of creditors, the ma-  
jority in value of the creditors who prove  
debts may choose an assignee or assignees,  
to be called the creditors' assignee; but the  
Court may reject any person so chosen, and  
thereupon a new choice must be made.  
(Act of 1861, s. 116.)

Security by  
assignees,  
and appoint-  
ment of a  
manager.

And the majority in value of the creditors  
present must determine whether any security  
shall be given by such assignee; and such  
security may be by way of bond to a regis-  
trar; and they may also determine whether  
a manager shall be appointed. (Act of 1861,  
s. 122.)

Appoint-  
ment of  
bankrupt to  
manage and  
help.

The assignees may, with the approbation  
of the Court, appoint the bankrupt himself  
to superintend the management of his estate,

or to carry on his trade, and in other respect to aid them in administering the estate. (Act of 1849, s. 150.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. VI.

When the election of an assignee shall have been accepted by the person elected, and confirmed by the Court, the Court must, by certificate under the hand of the Commissioner and the seal of the Court (to be called the certificate of appointment), declare such creditors' assignee to have been duly elected, and appoint him. (Act of 1861, s. 123.)

Certificate of  
appointment.

A majority in number and value of the creditors may remove the creditors' assignee or manager, or accept of his resignation; and one-fourth in value of the creditors who have proved may apply for the removal of the creditors' assignee or manager, and the Court may remove such creditors' assignee or manager, and appoint a meeting for electing a new creditors' assignee; and if the assignee dies, resigns, or is removed, or remains abroad, a new creditors' assignee may be appointed. (Act of 1861, s. 124.)

Appoint-  
ment of a  
new credi-  
tors' assignee  
or manager.

The Court may, for sufficient cause, appoint an official assignee to act jointly with the creditors' assignee, or may remove the creditors' assignee, and direct a choice of an-

Power of the  
Court as re-  
gards the ap-  
pointment of  
assignees.

PART IV. other assignee, or may appoint an official  
 TIT. II. assignee alone to wind up and administer the  
 CAP. III. estate. (Act of 1861, s. 124, 139.)  
 SEC. VI.

Divestment  
 of estate out  
 of the official  
 assignee.

Upon the appointment of the creditors' assignee, all the estate of the bankrupt thereupon becomes divested out of the official assignee and vested in the creditors' assignee. (Act of 1861, s. 117.)

Account and  
 list of credi-  
 tors to be  
 rendered by  
 official as-  
 signee.

The official assignee must render to the creditors' assignee an account and a list of all creditors who have proved. (Act of 1861, s. 118.) And the creditors' assignee must audit such account in the presence of a registrar, or, where the registrar is also official assignee, in the presence of the Judge. And a printed copy of the account, when audited, must be sent to every creditor who has proved. (Act of 1861, s. 119.)

Realisation  
 of the assets.

It is the duty of the creditors' assignee to manage, realise, and recover the bankrupt's estate generally, and convert it into money, and pay all moneys not necessarily retained for current expenses, and all public securities and bills and notes belonging to the estate, into the Bank of England. (Act of 1861, s. 127.) But the official assignee must collect, realise, and recover every debt which does not exceed the sum of 10*l.*, and must pay all sums so

collected, realised, and recovered, into the Bank; and as to all such sums, he is deemed sole assignee of the estate. (Act of 1861, s. 128.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. VI.

The assignees, with the leave of the Court, may commence, prosecute, or defend any action or suit in place of the bankrupt, and, subject to the consent of creditors, accept a composition, or give time, or take security for the payment of debts, and submit to arbitration. (Act of 1849, s. 153.)

Powers of  
assignees.

A creditors' assignee must render an account to the official assignee; and if he is dissatisfied, the same shall be enquired into by the registrar; and if no creditors' assignee is appointed, the official assignee must render the account to the registrar. But in the case of county court registrars, their accounts, as official assignees, must be rendered to, and examined and passed by, the Judges of their respective courts. (Act of 1861, s. 129.)

Account by  
the creditors'  
assignee to  
the official  
assignee or  
the registrar.

At the expiration of four months from the adjudication, or as much earlier as the Court shall appoint, the creditors' assignee must submit to a meeting of creditors a statement of the whole estate of the bankrupt, and all receipts and payments; and the official assignee must, and any creditor who has proved

Submitting  
statement of  
account.

Examination  
thereof.

PART IV. may, examine the statement and compare  
 TIT. II. the receipts and payments; and the meeting  
 CAP. III. must declare whether any and what part,  
 SEC. VI. after making a reasonable deduction for  
 Declaration as to sum to be divided, and allowance. future contingencies, shall be divided; and the majority in value must determine whether any and what allowance may be made to the bankrupt out of his estate. (Act of 1861, s. 174.)

Statement of creditors' assignee's accounts. After the passing of each account of the creditors' assignee, a statement must be made by the official assignee, and sent to every creditor who has proved. (Act of 1861, s. 130.)

Position of official assignee after discharge of creditors' assignee. Where the creditors' assignee has obtained an order of discharge, the official assignee represents the estate, and has all the rights, duties, and powers of the official and creditors' assignee. (Act of 1861, s. 182.)

## SECTION VII.

### *Of the Property which vests in Assignees.*

What vests in the assignees. Subject to the qualifications and exceptions introduced by statute, it is a fundamental rule and principle of the bankrupt laws, that the title of the assignees has relation back to the Act of Bankruptcy. (Sup. to Selw. N.P. 271.)

All the bankrupt's personal estate, and all property which may come to him before he has obtained his certificate, and all debts due to him, become absolutely vested in the assignees. (Act of 1849, s. 141.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. VII.

All hereditaments (except copy or customary hold) to which the bankrupt is entitled, and all interests in any of such hereditaments of which he might have disposed, and all such hereditaments as he has purchased or have come to him before obtaining his certificate, and all deeds and papers respecting the same, become absolutely vested in the assignees. (Act of 1849, s. 142.)

Clauses in 3 & 4 Will. IV. c. 74, with respect to the disposition of estates tail under bankruptcies, are extended to proceedings under petition for adjudication. (Act of 1849, s. 208.)

Clauses in  
the stat. 3 &  
4 Will. IV.  
c. 74, as to  
estates tail.

The Court may dispose of any copyhold or customary land, and make an order vesting the land, or such estate or interest as the bankrupt has therein, in such person and in such manner as the Court may think fit. (Act of 1861, s. 114.)

Vesting  
order as to  
copyhold or  
customary  
land.

The life estate of a bankrupt non-trader may not be sold before it falls into possession,

Life estate of  
a bankrupt.



PART IV. without an express direction of the Court.  
 TIT. II.  
 CAP. III. (Act of 1861, s. 115.)  
 SEC. VII.

Effect of an  
 election or  
 refusal by  
 assignees to  
 take land  
 conveyed or  
 leased, or  
 agreed to be  
 conveyed or  
 leased, to the  
 bankrupt.

If the assignees elect to take land conveyed, or agreed to be conveyed, to the bankrupt, subject to a rent, or the benefit of a lease, or agreement for a lease, the bankrupt will not be liable to pay any rent accruing after the filing of the petition, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements. And if the assignees decline to take such land, or the benefit of such conveyance or agreement, or such lease or agreement for a lease, the bankrupt will not be liable, if he delivers up the deed to the person entitled to the rent or having agreed to convey or lease. And if the assignees do not elect, any person entitled to such rent, or having so conveyed or agreed to convey, or leased or agreed to lease, or any person claiming under him, may apply to the Court, and the Court may order them to elect and deliver up such deed, in case they decline the same and the possession of the premises. (Act of 1849, s. 145.)

In every case of a lease or agreement for a lease, the assignees may elect to take the same, and to keep possession up to some

quarter or half-yearly day on which rent is payable, not being more than six months from the adjudication, and upon such day to decline it. (Act of 1861, s. 131.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. VII.

The assignees may have a sequestration of the profits of the benefice of a bankrupt clergyman, but the sequestrator must allow, out of the benefice, to the bankrupt, whilst he performs the duties of the parish or place, such an annual sum as the bishop shall direct, not exceeding that which he might have appointed to a curate. (Act of 1861, s. 135.)

Sequestration.

The bankrupt may be ordered to join in any conveyance of his estate to a purchaser; and if he do not execute it, he and all persons claiming under him will be stopped from objecting to its validity, and his right and title will be barred. (Act of 1849, s. 148.)

Order upon bankrupt to convey to a purchaser.

If a bankrupt has conveyed or pledged his estate, or deposited any deeds, subject to redemption, the assignees may, before the time for performing the condition as to redemption, tender or pay money, or otherwise perform the condition, and after such tender, payment, or performance, the estate may be sold for the benefit of the creditors. (Act of 1849, s. 149.)

Redemption and sale of estate mortgaged or pledged by bankrupt.

**PART IV.** No title to any real or personal estate sold  
**TIT. II.** under a bankruptcy may be impeached in  
**CAP. III.** respect of any defect in any of the proceed-  
**SEC. VII.** ings, unless the bankrupt have within a  
 certain time commenced proceedings to dis-  
 pute, dismiss, or annul the petition or adju-  
 dication, and duly prosecuted the same.  
 (Act of 1849, s. 131.)

Impeaching  
title to pro-  
perty sold.

**Transfer of** If a bankrupt has any government stock,  
**bankrupt's** funds, or annuities standing in his name in  
**funded pro-** his own right, the Court may order the  
**perty to the** transfer of the same into the name of the  
**assignees.** assignees, and the payment of all dividends  
 upon the same to the official assignee. (Act  
 of 1849, s. 128.)

Order upon  
an officer or  
agent to pay  
or deliver  
over to the  
assignees or  
the Bank.

The Court may order any treasurer or  
 other officer, or any banker, solicitor, or  
 other agent of the bankrupt, to pay and  
 deliver over, to the official assignee or to the  
 Bank of England, all moneys or securities  
 for money in his possession or power as such  
 officer or agent, and which he is not by law  
 entitled to retain. (Act of 1849, s. 132.)

Chattels in  
the order or  
disposition of  
the bank-  
rupt.

If a bankrupt has in his possession, order,  
 or disposition, any goods or chattels whereof  
 he was reputed owner, or whereof he had  
 taken upon him the sale, alteration, or dis-  
 position as owner, the Court may order the

same to be sold for the benefit of the creditors. (Act of 1849, s. 125; Tudor's Ca. on M. L. 400.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. VII.

The assignees may sell all or any of the book debts and the goodwill of the bankrupt's business. (Act of 1861, s. 137.)

Sale of book  
debts and  
goodwill.

The Court may order such portion of the pay, half-pay, salary, emolument, or pension of any bankrupt, as the chief officer of the department may officially sanction, to be paid to the assignees, to be applied in payment of the bankrupt's debts. (Act of 1861, s. 134.)

Pay, half-  
pay, salary,  
or pension.

All powers vested in a bankrupt for his own benefit, except the right of nomination to a benefice, may be executed by the assignees. (Act of 1849, s. 147.)

Powers.

An uncertificated bankrupt may acquire property and contract for the benefit of his assignees, and may sue in respect of such property or contract. But the assignees cannot recover in respect of the mere personal labour of the bankrupt. (Sup. to Selw. N. P. 323.)

Acquisition  
of property  
and contracts  
by uncerti-  
ficated bank-  
rupt.

## SECTION VIII.

*Of the Bankrupt's Duty, Liability, and Protection.*

PART IV.  
TIT. II.  
CAP. III.  
SEC. VIII.

Arrest and seizure of the documents and property of a debtor who is about to quit England.

When there is probable cause for believing that a person against whom a petition for adjudication has been filed, is about to quit England, and to remove or conceal any of his goods or chattels, with intent to defraud his creditors, the Court may authorise his arrest, and the seizure of his books, papers, moneys, goods, and chattels. But the petitioning creditor may be required to show cause why the person arrested should not be discharged, or why the things seized should not be delivered up to him. (Act of 1849, s. 99.)

Apprehension of bankrupt who is keeping out of the way.

If a bankrupt is keeping out of the way, and cannot be personally served with a summons, or there is probable cause for believing that he is about to leave England, or to remove or conceal any of his goods or chattels, the Court may direct him to be apprehended and brought before it to be examined. (Act of 1849, s. 119.)

Bankrupt's statement of accounts.

The bankrupt must prepare a statement, upon oath, of his accounts, and subscribe and file it. (Act of 1861, s. 141.) This is open to

the inspection of all creditors, who may take copies of and extracts from it; and an abstract of it must be sent to each creditor who has proved. (Act of 1861, s. 142.) The official assignee must assist the bankrupt in the preparation of it, and prepare and file a report upon the state of the bankrupt's affairs. If necessary, the Court may nominate some other person to assist the bankrupt; and if any such person is employed, he must sign a certificate, appended to the statement, expressing his approval or disapproval thereof, and the reasons for such disapproval. (Act of 1861, s. 143.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. VIII.

When a bankrupt is in custody, the Court may appoint a person to attend him, to produce to him his books, papers, and writings, in order that he may prepare his balance-sheet and show the particulars of his estate. (Act of 1849, s. 163.)

The bankrupt must deliver up to the official assignee, upon oath, all books and papers relating to his estate which are in his custody or power, and discover such as are in the custody or power of any other person. (Act of 1849, s. 105.)

Delivery  
up and dis-  
covery of  
books and  
papers.

No person, as against the assignees, may withhold possession of the bankrupt's books

Right of as-  
signees to  
the books of

PART IV. of account, or claim any lien thereon. (Act  
TIT. II. of 1861, s. 121.)  
CAP. III.

SEC. VIII.

account as  
against third  
persons.

Bankrupt's  
freedom  
from arrest.

Practice  
when bank-  
rupt is in  
custody.

If the bankrupt is not in custody, he will be free from arrest by any creditor in coming to surrender, and after such surrender for such time as the Court shall think fit; and whenever a bankrupt is in custody, the Court may order him to be brought before it at any sitting; and if he is desirous to surrender, he must be so brought up; and where any person, who has been adjudged bankrupt and has obtained his protection, is in custody for debt, the Court may order his immediate release. But the Court must not order such release where he is in custody for a debt contracted by fraud or breach of trust, or by reason of an offence, or for a debt by reason of any judgment, or for breach of the revenue laws, or for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious trespass, or for maliciously filing or prosecuting a petition for adjudication of bankruptcy. (Act of 1849, s. 112.)

Release of  
bankrupt.

If a bankrupt is arrested for debt or on any escape warrant in coming to surrender, or is arrested after his surrender and while protected by order, he must, on producing

such protection, be immediately discharged. PART IV.  
TIT. II.  
CAP. III.  
SEC. VIII.  
(Act of 1849, s. 113.)

After his certificate, the bankrupt must do any act necessary for getting in or protecting the estate. Acts for getting in or protecting the estate. (Act of 1849, s. 105.)

### SECTION IX.

#### *Of the Examination of the Bankrupt and other Persons.*

The Court may summon any bankrupt before it, and, in case he shall not come, and have no lawful impediment, may by warrant direct him to be apprehended and brought before the Court. And upon his appearance he may be examined, either orally or in writing, as to all matters relating to his trade, dealings, or estate; and when his examination is reduced into writing, he must sign it. Examination of bankrupt,  
(Act of 1849, s. 117.)

The Court may also summon before it the bankrupt's wife, and examine her for the discovery of the bankrupt's estate. or his wife. (Act of 1849, s. 118.)

The Court, before adjudication, may summon before it any person capable of giving any information concerning the trading or Summoning of third persons before adjudication.



PART IV. act of bankruptcy of the debtor, and may  
 TIT. II. require such person to produce any document  
 CAP. III. necessary to establish such act of trading or  
 SEC. IX. act of bankruptcy. (Act of 1849, s. 100.)

Summoning  
 of third per-  
 sons after ad-  
 judication.

The Court may summon before it any person known or suspected to have any of the bankrupt's estate, or supposed to be indebted to him, or capable of giving information, and may require such person to produce documents; and if he does not come (having no lawful impediment), the Court may direct him to be apprehended and brought before it for examination. (Act of 1849, s. 120.)

Where any person to whom any such summons is directed is keeping out of the way, and cannot be personally served therewith, the Court may order that the delivery of a copy of it to the wife or servant or some adult inmate of the house or family of the person, at his usual or last known place of abode or business, and explaining the purport thereof, shall be equivalent to personal service. (Act of 1849, s. 121.)

Mode of ex-  
 amination.

The Court may examine any person upon oath, either orally or in writing, concerning the person, trade, dealings, or estate of the bankrupt, or any act of bankruptcy, and re-

duce into writing the answers, and he must sign the same. (Act of 1849, s. 122.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. IX.

Parties and witnesses summoned before a registrar are bound to attend, and will in case of default be liable to process of contempt; and all persons wilfully and corruptly swearing or affirming falsely before a registrar, will be liable to all the consequences of perjury. (Act of 1861, s. 54.)

Parties and witnesses not attending before a registrar, or wilfully swearing falsely before him.

If a person examined before a registrar refuses or declines to answer, or to swear to or sign his examination, the registrar must refer the matter to the Commissioner, who may order the person so acting to pay the costs. (Act of 1861, s. 55.)

Person examined before a registrar, refusing to answer, or to swear, or to sign his examination.

If a person examined admits that he is indebted to the bankrupt, the Court may order that he pay the amount, and the order will have the effect of a judgment. (Act of 1849, s. 123.) Such admission must be signed in the presence of some officer of the Court, who must attest the signature. (Act of 1861, s. 111.)

Admission of debt due to bankrupt.

The Court may command the attendance of witnesses who are in any part of the United Kingdom. And the Court may direct the examination in Scotland and Ireland of any person capable of giving information as

Attendance of witnesses.

Examination of witnesses in Scotland or Ireland.

PART IV. to the acts, estate, or dealings of a bankrupt  
TIT. II.  
CAP. III. or petitioner. (Act of 1861, s. 215-7.)

SEC. IX. A bankrupt or bankrupt's wife, and any

False oath or  
affirmation.

person, who shall wilfully and corruptly swear or affirm anything false, will be liable to the penalties of perjury. (Act of 1849, s. 254.)

## SECTION X.

### *Of the Proof of Debts ; and of Payments in full.*

Debts con-  
tracted after  
the bank-  
ruptcy.

Bonâ fide creditors, in respect of debts contracted after, but without notice of, an act of bankruptcy, may prove. (Act of 1849, s. 165.)

Money pay-  
able under  
process of  
contempt.

A person entitled to enforce payment of any money, costs, or expenses against the bankrupt, by process of contempt, may prove for the amount. (Act of 1861, s. 149.)

Proportion-  
ate part of  
periodical  
payments.

A person entitled to a proportionate part of rent and other payments falling due at fixed periods, may prove for the same. (Act of 1861, s. 150.)

Instalments.

A creditor whose debt is payable by instalments may prove for the amount remaining unpaid. (Act of 1861, s. 151.)

The Court may assess, or direct the assessment, by a jury before itself or in a court of law, of damages under a contract; and the amount will be provable. (Act of 1861, s. 153.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. X.

Damages.

A person entitled to the benefit of a contract under which a bankrupt is liable to pay, repay, or indemnify another against premiums or periodical payments, may apply to the Court to set a value upon his interest; and such person may prove for the amount, when ascertained. (Act of 1861, s. 154.)

Payments in respect of premiums or sums payable periodically.

A person who has given credit to the bankrupt, upon valuable consideration, for any money which shall not have become payable at the time of the act of bankruptcy, may prove as if the same were payable presently, deducting only thereout a rebate of interest at 5 per cent. per annum. (Act of 1849, s. 172.)

Money payable at a future time.

A person who is surety or liable for a debt of the bankrupt, or bail for him, if he has paid the debt, and the creditor has proved his debt, may stand in the place of the creditor in respect of proof, or, if the creditor has not proved, may prove in respect of such payment; provided he had not notice of the act of bankruptcy when he became surety, or bail, or liable. (Act of 1849, s. 173.)

Liability in respect of suretyship.

PART IV.  
TIT. II.  
CAP. III.  
SEC. X.

Claim of  
obligee in a  
bottomry or  
respondentia  
bond, or of  
an insured.

The obligee in a bottomry or respondentia bond, and the assured in any policy of insurance, may claim, and, after the loss or contingency has happened, may prove his debt or demand; and the person effecting any policy of insurance upon ships or goods with a bankrupt, may prove any loss to which the bankrupt is liable, although the person so effecting such policy was not beneficially interested in such ships or goods, in case the person so interested is not within the United Realm. (Act of 1849, s. 174.)

Annuity.

An annuity creditor may prove for the value of the annuity, to be ascertained by the Court. (Act of 1849, s. 175.) A person entitled to an annuity granted by a bankrupt may not sue a collateral surety for the payment of it until such annuitant has proved for the value; and if the surety pay the amount proved, he will be discharged from all claims in respect to the annuity. And if he does not pay the sum proved, he may be sued for the accruing payments, and, after payment or satisfaction, the surety will stand in the place of the annuitant in respect of such proof, to the amount so paid or satisfied by the surety, and the certificate of

the bankrupt will be a discharge to him. (Act of 1849, s. 176.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. X.

If a bankrupt has contracted a debt payable upon a contingency, which has not happened before the filing of the petition for adjudication, the Court may ascertain the value, and admit the creditor to prove, or, if the value is not ascertained before the happening of the contingency, the creditor may, after that event, prove in respect of the debt, provided the creditor had not notice of an act of bankruptcy when the debt was contracted. (Act of 1849, s. 177.)

Debt payable  
on a con-  
tingency.

If a trader has contracted a liability to pay money upon a contingency, and the demand in respect thereof has not been ascertained, the person with whom such liability has been contracted will be admitted to claim for such sum as the Court shall think fit; and after the contingency has happened and the demand has been ascertained, he may prove such demand, but not disturb the former dividends, provided he had not notice of an act of bankruptcy at the time when the liability was contracted. But where any such claim is not converted into a proof within six months from the

Liability to  
pay money  
on a contin-  
gency.

PART IV. filing of the petition, it may be expunged.

TIT. II.

CAP. III. (Act of 1849, s. 178.)

SEC. X.

Goods  
pledged by  
agent.

In case of the bankruptcy of an agent, intrusted with goods which have been pledged by him and redeemed by the owner, the owner will be held to have paid the sum for redemption for the use of the agent, or, in case the goods shall not be so redeemed, the owner will be deemed the creditor of the agent for the value of the goods. (Act of 1849, s. 179.)

Interest.

Upon all debts or sums certain, whereupon interest is not agreed for, and which are overdue at the time of the petition for adjudication, the creditor may prove for interest at not more than 4 per cent. up to the filing of the petition. (Act of 1849, s. 180.)

Costs.

If a plaintiff or petitioner in bankruptcy or lunacy has obtained a judgment, decree, or order for a debt or demand, proved under the bankruptcy, he may prove for the costs; and a defendant who has obtained a judgment, decree, or order against a bankrupt, may prove for the costs. (Act of 1849, s. 181.)

Arrears of  
rent.

No distress for rent levied after an act of bankruptcy is available for more than one year's rent accrued before the filing of a

petition for adjudication. But the landlord or person to whom the rent was due may come in as a creditor for the overplus. (Act of 1849, s. 129.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. X.

The Court will order payment of assessed taxes assessed up to the 5th of April next after the bankruptcy, and the bankrupt will not be liable after that day in respect of any article kept for trade purposes at or before the time of the bankruptcy, and bonâ fide sold under it, and not kept after that day. (Act of 1849, s. 166.)

Assessed  
taxes.

The Court will order payment of all parochial rates due during the twelve months immediately preceding the bankruptcy, and unpaid at the time of the adjudication. (Act of 1861, s. 156.)

Parochial  
rates.

If any person having in his possession, by virtue of his employment, any moneys or effects, deeds, or securities, belonging to a society, becomes bankrupt, the Court will order payment and delivery over of such things to the society, and will also order payment, out of the bankrupt's estate, of all money due, which the bankrupt received by virtue of his employment, before any other of his debts are paid. (Act of 1849, s. 167.)

Moneys or  
effects, deeds,  
or securities  
belonging to a  
society.

The Court may order payment out of the



**PART IV.** estate of sums due for wages or salary of a  
**TIT. II.** servant or clerk, not exceeding three months'  
**CAP. III.** wages or salary, and not exceeding 30*l.*, and  
**SEC. X.** the servant or clerk may prove for any sum  
 exceeding that amount. (Act of 1849, s. 168.)

Wages of  
clerks or  
servants.

**Wages of** The Court may order payment out of the  
**labourers or** estate of the wages of a labourer or work-  
**workmen.** man, not exceeding 40*s.*, and he may prove  
 for any sum exceeding that amount. (Act  
 of 1849, s. 169.)

**Apprentices.** The filing of a petition for adjudication is  
 a discharge of an indenture of apprentice-  
 ship; and if an apprentice-fee has been  
 paid, the Court may order a reasonable sum  
 to be paid out of the estate to or for the  
 apprentice. (Act of 1849, s. 170.)

**Set-off.** Where there has been mutual credit, or  
 where there are mutual debts, one debt or  
 demand may be set against another, notwith-  
 standing any prior act of bankruptcy before  
 the credit was given or the debt was con-  
 tracted. (Act of 1849, s. 171.)

**Mode of** A creditor may prove his debt by deliver-  
**proof.** ing or sending a statement, with a declara-  
 tion signed by him that such statement is  
 a true and complete statement of account,  
 and that the debt is justly due; and bodies  
 politic and public companies incorporated or

authorised to sue may prove by an agent. PART IV.  
TIT. II.  
CAP. III.  
SEC. X.  
(Act of 1861, s. 144.)

Any person wilfully and corruptly making any declaration for proof of debt is liable to the penalties of perjury. (Act of 1861, s. 145.)

A creditor may also prove his debt by deposition in Court, or in chambers, or before a registrar, or by affidavit, upon his own oath, or upon that of any clerk or other person in his employment. (Act of 1861, s. 146.)

The Court may examine, upon oath or otherwise, any person tendering or who has made a proof, or may require further proof, and may summon any person capable of giving evidence concerning such proof. (Act of 1861, s. 148; Act of 1849, s. 164.)

The official or creditors' assignee must examine all the statements of account, and compare them with the bankrupt's books and documents, and make out a list of the creditors who have proved, stating the amount and nature of the debts; which list is open to the inspection of any creditor who has proved. (Act of 1861, s. 147.)

Examination  
of accounts.

List of creditors who  
have proved.

No creditor who has brought an action or instituted a suit may prove a debt without relinquishing the action or suit. And the proving or claiming a debt, under a petition

Election to  
relinquish an  
action or  
suit.

PART IV. for adjudication, will be deemed an election  
 TIT. II.  
 CAP. III. to take the benefit of the petition. (Act of  
 SEC. X. 1849, s. 182.)

Expunging a proof. The Court may expunge or reduce a proof of debt. (Act of 1861, s. 155.)

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## SECTION XI.

### *Of the Dividend.*

Debiting creditors' assignee with interest. If the creditors' assignee has kept in his hands more than 50*l.*, the creditors may debit him for interest for the amount, at a rate not exceeding 20 per cent. per annum. (Act of 1861, s. 175.)

Calculation of a dividend. In the calculation of a dividend, provision must be made for debts due to persons resident in places so distant that they have not had time to tender or establish their proof, and also for undetermined claims. (Act of 1861, s. 176.)

List of creditors with their dividends. After the meeting of creditors, subsequent to adjudication, the official assignee must prepare a list of creditors entitled to dividend, and set opposite to the name of each creditor his dividend, and forward to every such

creditor a statement of his dividend. (Act of 1861, s. 178.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. XI.

The like proceedings for the making up and auditing the accounts, and the declaration and payment of the dividend, must be had at every period of four months, or earlier, until the whole estate is divided. But the majority in value of the creditors at any such meeting may postpone the period of declaring the dividend, or may declare that the second dividend shall be final. (Act of 1861, s. 179.)

Subsequent  
accounts and  
dividends.

No creditor having security, or having made an attachment of the goods and chattels of the bankrupt, may receive more than a rateable part of such debt, except in respect of an execution or extent served and levied by seizure and sale upon the bankrupt's property, or any mortgage or lien upon the same, before the filing of the adjudication. (Act of 1849, s. 184.)

Where a creditor may receive more than a rateable proportion.

Every creditors' assignee must transmit to the official assignee a list of unclaimed dividends, and of all debts remaining due to the estate, and pay all moneys and other estate into the Bank of England. (Act of 1861, s. 181.)

List of unclaimed dividends and outstanding debts.

Payment into Bank.

All unclaimed dividends and all moneys unclaimed must be transferred to the credit

Transfer of unclaimed moneys.

**PART IV.** or, if a trader, he has, with intent to conceal  
**TIT. II.** the true state of his affairs, wilfully omitted  
**CAP. III.**  
**SEC. XII.** to keep proper books of account, or, whether  
 — trader or not, his insolvency is attributable  
 to rash and hazardous speculation or unjustifiable extravagance in living, or he has put any of his creditors to unnecessary expense by frivolous or vexatious defence to any action or suit to recover any debt or money due from him, the Court may either refuse an order of discharge, or may suspend the same, or may grant an order of discharge subject to any condition. (Act of 1861, s. 159.)

Discharge of bankrupts whose certificates have been refused before the Act of 1861.

In the case of any bankrupt whose certificate of conformity has been refused before the Act of 1861, the Court may, after the expiration of three years from the time of such refusal, hear and determine his application for an order of discharge in the same manner as if the bankruptcy had taken place after the commencement of that statute. (Act of 1861, s. 160.)

Effect of the order of discharge.

Subject to any conditions that may be imposed by the Court under the 159th section of the Act of 1861 (Roche & Haz. p. 184), the order of discharge will discharge the bankrupt from all debts, claims, or demands provable under his bankruptcy; and if thereafter he is arrested

or any action is brought against him, for any such debt, claim, or demand, he will be discharged upon entering an appearance, and may plead in general that the cause of action accrued before he became bankrupt; and the order of discharge will be sufficient evidence of the bankruptcy and the proceedings precedent to the order of discharge. (Act of 1861, s. 161.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. XII.

If a bankrupt, after the order of discharge takes effect, is arrested or detained in custody for a debt, claim, or demand, provable under the bankruptcy, where judgment has been obtained before the order of discharge takes effect, the Court or a judge of a superior court of law will, unless there appear good reason to the contrary, direct his discharge. (Act of 1861, s. 162.)

After the order for discharge takes effect, the bankrupt will not be liable to any debt or demand provable under the bankruptcy on any contract made after adjudication. (Act of 1861, s. 164.)

The order of discharge will discharge the bankrupt from the effects of any process of contempt for non-payment of money or costs or expenses. (Act of 1861, s. 165.)

A contract, covenant, or security for

**PART IV.** securing the payment of money as a consideration to persuade the creditor to forbear  
**TIT. II.**  
**CAP. III.** opposing the order for discharge, or to forbear  
**SEC. XII.** to petition for a rehearing of or to

Inducing  
 creditor to  
 forbear opposing  
 order  
 of discharge.

appeal against the same, will be void; but no such security, if a negotiable security, will be void as against a bonâ fide holder thereof for value without notice of the consideration. (Act of 1861, s. 166.)

Reviewing  
 order of  
 discharge.

The order of discharge will not be reviewed, unless obtained fraudulently. (Act of 1861, s. 168.)

When the  
 order of discharge  
 shall be drawn up  
 and bear  
 date.

The order of discharge is not to be drawn up until after the expiration of the time allowed for appeal, or, if an appeal is brought, until after the decision thereon, and it must bear date either the day after the expiration of the time allowed for appeal, or the day of the decision of the Court of Appeal, as the case may require. (Act of 1861, s. 170.)

Appeal for  
 or against  
 the order of  
 discharge.

A creditor or a creditors' assignee, or the bankrupt, may, if the order of discharge has been made or refused by any Commissioner or county court judge, apply to the Court of Appeal in Chancery, that such order of discharge may be granted, or recalled and delivered up to be cancelled. (Act of 1861, s. 171.)

Notice of the granting of the order of discharge must be advertised. (Act of 1861, s. 172.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. XII.

Notice of the order.

### SECTION XIII.

#### *Of Transactions affected or not affected by the Bankruptcy.*

If a bankrupt, being at the time insolvent, shall (except upon the marriage of any of his children, or for valuable consideration) have conveyed, assigned, or transferred any hereditaments, goods, or chattels, or made over any securities, or transferred his debts, the Court may order the same to be sold for the benefit of the creditors. (Act of 1849, s. 126.)

Fraudulent transfers.

Every warrant of attorney to confess judgment in a personal action, given by a bankrupt within two months before the filing a petition for adjudication, and in respect of an antecedent debt or money demand, and every cognovit actionem, or consent to a judge's order for judgment, given by a bankrupt within two months before the filing the petition, in an action commenced by collusion with the bankrupt, or having been in fact given before the commencement of an

Warrants of attorney to confess judgments, cognovits, and consent to a judge's order for judgment.



**PART IV.** action, the bankrupt being unable to meet  
**TIT. II.** his engagements, is to be deemed to be null  
**CAP. III.** and void. (Act of 1849, s. 135.) But non-  
**SEC. XIII.** observance of these enactments does not  
 render the warrant of attorney, cognovit, or  
 judge's order void as against the trader him-  
 self, but only as against the assignees. (Sup.  
 to Selw. N. P. 309-11.)

What trans-  
 actions prior  
 to the peti-  
 tion for ad-  
 judication  
 are valid.

All payments really and bonâ fide made  
 by a bankrupt to a creditor before the filing  
 of the petition for adjudication, and all pay-  
 ments really and bonâ fide made to a bank-  
 rupt before the filing of the petition, and all  
 conveyances by a bankrupt bonâ fide exe-  
 cuted before the filing of the petition, and  
 all contracts, dealings, and transactions by  
 and with a bankrupt, really and bonâ fide  
 made before the filing of the petition, and  
 all executions and attachments bonâ fide  
 executed before that time, are valid, notwith-  
 standing a prior act of bankruptcy, provided  
 the person so dealing with, or paying to, or  
 being paid by the bankrupt, or at whose suit  
 or on whose account the execution or attach-  
 ment issued, had no notice of a prior act of  
 bankruptcy. But this is not to be con-  
 sidered as authorising any fraudulent prefer-  
 ence. (Act of 1849, s. 133.)

No purchase from a bankrupt, *bonâ fide* and for valuable consideration, where the purchaser had notice of an act of bankruptcy, can be impeached by reason thereof, unless a petition for adjudication shall have been sued out or filed within twelve months after the act of bankruptcy. (Act of 1849, s. 134.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. XIII.

#### SECTION XIV.

*Of suspending Bankruptcy Proceedings, and winding up the Estate as the Creditors may think fit.*

If any proposal is made by the bankrupt, which it appears to the major part in value of the creditors then present ought to be accepted, or if they resolve that no further proceedings be taken in bankruptcy, the meeting must be adjourned, in order that notice of such resolution may be given to every creditor; and if, at such adjourned meeting, a majority in number, representing three-fourths in value, of the creditors present so resolve, the proceedings in bankruptcy must be suspended, and the estate and effects be administered as such majority

Resolution  
of creditors  
to stay pro-  
ceedings in  
bankruptcy.

PART IV. shall direct; and the bankrupt, having made  
 TIT. II.  
 CAP. III. a full discovery of his estate, may then apply  
 SEC. XIV. for his discharge. (Act of 1861, s. 110.)

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### SECTION XV.

#### *Of the Change from Bankruptcy to a Deed of Arrangement, subject to the Approval and Control of the Court.*

Resolution to wind up under a deed. At the first meeting of creditors after adjudication, or at any meeting for the purpose, three-fourths in number and value of the creditors present or represented may resolve that the estate ought to be wound up under a deed. (Act of 1861, s. 185.)

Subsequent proceedings for that purpose. The registrar must report such resolution to the Court, and the bankrupt or creditor may apply to the Court, that the proceedings in bankruptcy may be stayed; and if the Court consider the resolution to be reasonable and calculated to benefit the general body of the creditors, it will confirm the same, and give such directions as to the interim management of the estate as may be deemed expedient. (Act of 1861, s. 186.)

The bankrupt or a creditor may produce to the Court a deed of arrangement, signed by or on behalf of three-fourths in number

and value of the creditors. And if the Court considers its terms to be reasonable and calculated to benefit the general body of the creditors, the Court will make a declaration of its complete execution, and direct it to be registered, and may annul the bankruptcy. (Act of 1861, s. 187.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. XV.

Either before or after such order, the Court has jurisdiction respecting the disclosure, management, or winding up of the bankrupt's estate and affairs, or respecting the execution of any of the trusts or provisions of the deed, or the audit or examination of the accounts of a trustee or inspector, or the taxation or examination of the costs or charges, or generally for the decision of any dispute or question. (Act of 1861, s. 188.)

If the resolution is not duly reported, or if the Court refuses the application to stay proceedings, or if the deed of arrangement is not duly produced, or if, upon its production, the Court does not think fit to approve of it, the bankruptcy will proceed, as though no such solution had been passed. (Act of 1861, s. 190.)

If the bankruptcy is annulled, the order annulling the same must be filed, and notice thereof be given in the London 'Gazette.' (Act of 1861, s. 191.)

Notice of a  
bankruptcy  
being an-  
nulled.

## SECTION XVI.

*Winding up a Debtor's Estate under a Deed of Composition, subject to the Jurisdiction of the Court, where no Bankruptcy Proceedings have been taken.*

PART IV.     A deed or instrument entered into between  
 TIT. II.     a debtor and his creditors, or any of them, or  
 CAP. III.   a trustee on their behalf, will be binding on  
 SEC. XVI.   all the creditors, if the following conditions  
 be observed:—1. A majority in number,  
 Creditors'     representing three-fourths in value, of the  
 deed when     creditors whose debts amount to 10*l.* and  
 binding on     upwards, must assent to the deed or instru-  
 all the credi-   ment.   2. The trustee or trustees must  
 tors.         execute the same.   3. It must be attested  
                  by a solicitor.   4. It must be registered at  
                  the office of the chief registrar.   5. An  
                  affidavit or a certificate, by the trustee or  
                  trustees, that a majority in number, represent-  
                  ing three-fourths in value, of the creditors  
                  whose debts amount to 10*l.* or upwards, have  
                  in writing assented, and also stating the  
                  amount of the property comprised, must be  
                  delivered to the chief registrar.   6. It must  
                  be duly stamped.   7. Immediately on execu-  
                  tion, possession of the property must be given  
                  to the trustees. (Act of 1861, s. 192.)

Every arrangement or agreement made by a debtor with his creditors or any person on their behalf, must be registered in the Court of Bankruptcy, and, in default thereof, it will not be received in evidence. (Act of 1861, s. 194.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. XVI.  
Registration.

A memorandum of registration must be written on the face of such deed. (Act of 1861, s. 196.)

After the registration, the debtor and creditor and trustees will be subject to the jurisdiction of the Court of Bankruptcy, and will have the benefit of, and be liable to, the provisions of the Act, as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees; and the Court may determine all questions under the deed, according to the law and practice of bankruptcy. (Act of 1861, s. 197.)

Debtor, creditor, and trustees, subject to the law of bankruptcy.

After notice of the registration, no process against the debtor's property or person, other than such process as may be had against a debtor about to depart out of England, will be available, without leave of the Court. (Act of 1861, s. 188.)

Protection.

If a debtor cannot obtain the assent of a majority in number, representing three-fourths

Number of creditors required to bind the rest.

PART IV. in value, by reason of his being unable to  
TIT. II. ascertain by whom bills of exchange, or pro-  
CAP. III. missory notes, or other negotiable securities  
SEC. XVI. are holden, or by reason of the absence of  
creditors, or other similar circumstances, it  
will be sufficient if he obtain a majority in  
number, representing three-fourths in value,  
of all his other creditors, provided that  
notice shall have been inserted in one or  
more newspapers, requiring his creditors to  
signify their assent. (Act of 1861, s. 200.)

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## SECTION XVII.

### *Of Offences against the Bankrupt Law.*

Various mis-  
demeanors.

Any bankrupt who does any of the acts or things following, with intent to defeat or defraud creditors, is guilty of a misdemeanor, and may be subjected to punishment by imprisonment for not more than three years, or to any greater punishment attached to the offence. 1st. If he does not surrender (having no lawful impediment) and sign such surrender, and submit to be examined. 2nd. If he does not discover all his property, rights, and credits, and how, and to whom,

and for what consideration, and when he transferred any part thereof not bonâ fide disposed of in business or laid out in the ordinary expense of his family, or does not deliver up or dispose, as the Court directs, of that which is in his possession or power, and deliver up all books, papers, and writings in his possession or power, relating to his property or affairs. 3rd. If, after adjudication, or within sixty days prior to the adjudication, he removes, conceals, or embezzles any part of his property to the value of 10%. 4th. If, in case of any person having, in the belief of the bankrupt, proved a false debt, he fails to disclose the same to his assignees. 5th. If he wilfully and fraudulently omits any property from his schedule. 6th. If he conceals, prevents, or withholds the production of any book, deed, paper, or writing relating to his property, dealings, or affairs. 7th. If, after the filing of the petition, or within three months next before adjudication, he parts with, conceals, destroys, alters, mutilates, or falsifies any document relating to his property, trade, dealings, or affairs, or makes any fraudulent entry or statement in, or omission from, any book, paper, or document relating thereto.

PART IV.  
TIT. II.  
CAP. III.  
SEC. XVII.



PART IV. 8th. If, within the like time, he has made  
TIT. II.  
CAP. III. away with or encumbered any part of his  
SEC. XVII. property, or if, after adjudication, he con-  
ceals any debt due to or from him. 9th. If,  
under his bankruptcy, or at any meeting of  
his creditors within three months next pre-  
ceding the filing of the petition for adjudi-  
cation, he, being a trader, has attempted to  
account for any of his property by fictitious  
losses or expenses. 10th. If, within three  
months next before the filing of the petition  
for adjudication, under the pretence of car-  
rying on business and dealing in the ordinary  
course of trade, he, being a trader, has  
obtained on credit from any person any  
goods or chattels with intent to defraud.  
11th. If, within three months next before  
the filing of the petition for adjudication, he,  
being a trader, has pawned, pledged, or dis-  
posed of otherwise than by bonâ fide trans-  
actions in the ordinary way of his trade, any  
of his goods or chattels which have been  
obtained on credit and remain unpaid for.  
(Act of 1861, s. 221.)

And, in regard to the offences mentioned  
in the preceding paragraph, the Court has  
the jurisdiction, rights, and powers of justices  
of the peace, in respect of a charge or com-

plaint as to any felony or indictable misdemeanor. (Act of 1861, s. 222.)

PART. IV.  
TIT. II.  
CAP. III.  
SEC. XVII.

If a bankrupt or his wife refuses to make and sign the declaration required by the Act, or if any other person refuses to be sworn, or fully to answer, or to sign his or her examination, or to produce any documents which ought to be produced, the Court may commit such bankrupt, wife of such bankrupt, or other person, until submission to be sworn and fully answer, and sign such examination, and produce such documents. (Act of 1849, s. 260. And see Act of 1861, s. 211.)

Refusal to do certain acts.

If a person wilfully disobeys any rule or order of the Court, duly made for enforcing any of the purposes and provisions of the statute, the Court may commit the person so offending. (Act of 1861, s. 226.)

Disobedience to a rule or order.

If a petitioning creditor receives, after the bankruptcy, any money, satisfaction, or security for his debt, or any part thereof, whereby he receives more in the pound than the other creditors, he will forfeit his whole debt, and must also repay or deliver up such money, satisfaction, or security, or the full value thereof, for the benefit of the creditors. (Act of 1849, s. 268.)

Creditor receiving more than his proportion.

A person who wilfully conceals any real or

**PART IV.** personal estate of the bankrupt, and who  
**TIT. II.** does not, within forty-two days after the  
**CAP. III.** filing of the petition for adjudication, dis-  
**SEC. XVII.**

**Punishment  
for conceal-  
ing a bank-  
rupt's pro-  
perty.**

cover such estate to the Court or to the assignees, will forfeit the sum of 100*l.* and double the value of the estate so concealed.

**Reward for  
discovering  
it.**

And a person who voluntarily discovers any part of such estate, will be allowed 5 per cent., and such further reward as the assignees, with the consent of the Court, may think fit. (Act of 1849, s. 269.)

**Inducement  
not to oppose  
discharge.**

If a creditor obtains any sum of money, or any goods, chattels, or security for money, from any person, as an inducement for forbearing to oppose, or for consenting to the allowance of, the discharge of a bankrupt, or to forbear to petition for the recall of the same, such creditor will forfeit the treble value or amount of such money, goods, chattels, or security so obtained. (Act of 1861, s. 167.)

**Fraudulently  
and mali-  
ciously filing  
a petition.**

If the debt stated by the petitioning creditor is not really due, or if it is not proved that the person against whom the petition is filed was liable, and it also appears that the petition was filed fraudulently or maliciously, the Court will order satisfaction. (Act of 1861, s. 91.)

## SECTION XVIII.

*Of Miscellaneous Matter.*

Debts of a bankrupt may, with the concurrence of three-fourths in value of the creditors, be ordered to be discharged by means of money raised by way of mortgage or pledge. (Act of 1861, s. 133.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. XVIII.

Mortgage or  
pledge to pay  
debts.

Any mortgagee, with the leave of the Court, may bid at a sale. (Act of 1861, s. 132.)

Bidding at a  
sale.

Chattels sold under an execution for the recovery of a debt, money demand, or damages exceeding 50*l.*, must, unless the Court shall otherwise direct, be sold by the sheriff by public auction; and such sale must be publicly advertised. (Act of 1861, s. 74.)

Sale under  
an execu-  
tion.

The Court may order all post letters addressed to a bankrupt at the place of which he is described in the petition, to be re-addressed, sent, or delivered to the official or other assignee or other person named in such order. (Act of 1849, s. 124.)

Bankrupt's  
letters.

The assignees of a bankrupt trustee may be ordered to convey, assign, or transfer the trust property to such person as the Lord Chancellor shall think fit. (Act of 1849, s. 130.)

Bankrupt  
trustee.

If, on a rehearing, the Court annuls or

**PART IV.** suspends the order of discharge, all creditors

**TIT. II.**

**CAP. III.** between the time of the order originally

**SEC. XVIII.** taking effect and the time of its being an-

**Rights of in-**  
**tervening**  
**creditors,**  
**in the case of**  
**an order of**  
**discharge**  
**being annul-**  
**led or sus-**  
**pended.**

nulled or suspended, will, as against any property acquired by the bankrupt during the same period, and in priority to the original creditors, be admitted to prove. (Act of 1861, s. 169.)

**Where a**  
**debtor has**  
**been ad-**  
**judged bank-**  
**rupt or in-**  
**solvent in**  
**India or any**  
**colony.**

If a person who has been duly adjudged or declared bankrupt or insolvent in India or any of the foreign dominions of Her Majesty, is resident or is possessed of property in England, Ireland, or Scotland, or in any colony, plantation, or foreign possession of the Crown, an adjudication of bankruptcy, sequestration, or insolvency, may be applied for against such person in the Court of Bankruptcy in England, and in the proper Court in Scotland, Ireland, and such colony, plantation, or foreign possession. (Act of 1861, s. 218.)

**Enforcing**  
**English or-**  
**ders in Scot-**  
**land and Ire-**  
**land; and**  
**conversely.**

Any order made in England will be enforced in Scotland and Ireland; and orders, interlocutors, and decrees, made in Scotland, will be enforced in England and Ireland; and orders made by the Court in Ireland will be enforced in England and Scotland. (Act of 1861, s. 219.)

The Court and the district Courts in London, and the district Courts in the country, are in like manner auxiliary, for all purposes of proof of debt, and for the examination of persons and witnesses upon oath, or for other like purposes, to the Courts acting in matters of bankruptcy or insolvency in Scotland and in Ireland, and also to any Court acting in such matters in any colony, island, plantation, or place, under the dominion of Her Majesty, or to any British judge elsewhere so acting. (Act of 1861, s. 220.)

PART IV.  
TIT. II.  
CAP. III.  
SEC. XVIII.

Courts in  
England to  
be also aux-  
iliary to  
Courts in  
Scotland,  
Ireland, or  
elsewhere, in  
other re-  
spects; and  
conversely.

## CHAPTER IV.

OF THE INTERPOSITION OF THE COUNTY  
COURTS.

**PART IV.** In this chapter it is merely proposed to  
**TIT. II.**  
**CAP. IV.** give a statement of the general jurisdiction  
 of the County Courts.

—  
 Actions in  
 which the  
 County  
 Court has  
 jurisdiction.

Actions in  
 which it has  
 no juris-  
 diction.

As a general rule, the County Court has jurisdiction in all personal actions where the debt, damage, or demand is not more than 50*l*. But, except by agreement, the Court has no jurisdiction in any action of ejectment; nor in any action in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, is bonâ fide in dispute, and not merely asserted; nor in any case in which the validity of any devise, bequest, or limitation under any will or settlement, may be disputed; nor in any action for malicious prosecution, libel or slander, criminal conversation, seduction, or breach of promise of marriage. (Pollock, 34, 35-8.) But if a question of title arises incidentally, the judge may decide the

claim which it is the immediate object of the action to enforce, if both parties, at the hearing, consent by any writing signed by them or their attorneys. (Pollock, 35; Broom Com. 59, 65-7.)

PART IV.  
TIT. II.  
CAP. IV.

If both parties agree, by a memorandum signed by them or their attorneys, the Court has jurisdiction in all actions which may be brought in any superior court of common law, except an action for criminal conversation. (Pollock, 36.)

Jurisdiction  
by agree-  
ment.

A demand exceeding 50*l.*, but reduced by a disputed set-off to a sum not exceeding 50*l.*, is not within the jurisdiction; but the Court has jurisdiction in the case of a balance not exceeding 50*l.* after an admitted set-off. (Pollock, 35-6; Broom Com. 60, 61.)

Reduction of  
a claim by  
set-off.

The plaintiff may not divide a cause of action, for the purpose of bringing two or more suits in the County Court, even in the case of distinct items, if properly constituting one account or claim. The plaintiff, however, may reduce his claim to an amount within the jurisdiction of the Court; but, in such case, the judgment will be in full discharge of all demands in respect of the cause of action. (Pollock, 36-7; Broom Com. 61-4.)

Division of  
cause of  
action.

Limiting  
amount of  
claim.

The jurisdiction extends to the recovery



**PART IV.** of any demand not exceeding 50*l.*, which is  
**TIT. II.** the whole or part of the unliquidated balance  
**CAP. IV.** of a partnership account, or the amount of  
 ——— a distributive share under an intestacy, or of  
**Balance of** any legacy under a will not involving a trust.  
**accounts** (Pollock, 41; Broom Com. 68.)  
**between**  
**partners, or**  
**share under**  
**an intestacy,**  
**or of a legacy.**

**Concurrent** All actions and proceedings which before  
**jurisdiction** the creation of the new County Courts might  
**of the su-** have been brought in any of the superior  
**perior courts.** courts of record, may be brought and deter-  
 mined in any superior court at the election  
 of the parties suing, 1. if the plaintiffs or one  
 of the plaintiffs dwell more than twenty  
 miles in a direct line from the defendant;  
 2. if the cause of action did not arise wholly,  
 or in some material point, within the juris-  
 diction of the Court within which the de-  
 fendant dwells or carries on his business, as  
 a principal, at the time of the action brought;  
 3. if any officer of the County Court is a  
 party, except in respect of any claim to any  
 goods and chattels taken in execution of the  
 process of the Court, or the proceeds or value  
 thereof. (Pollock, 42-3, 49.)

**Loss of costs** If the plaintiff recovers in a superior court  
**in a superior** a sum not exceeding 20*l.* in actions of con-  
**court.** tract, and not exceeding 5*l.* in actions of tort,  
 he will have no costs, unless the County  
 Court had no jurisdiction in the matter, or

unless, in the case of an action of tort, the defendant suffered judgment by default, or unless the judge certifies that there was a sufficient reason for bringing the action in the superior court, or the superior court or judge at chambers orders payment of costs on that ground, or on the ground that the superior court had concurrent jurisdiction. (Pollock, 43-7 ; Broom Com. 69.)

PART IV.  
TIT. II.  
CAP. IV.

In actions of contract, within, or reduced by set-off or otherwise to or within 50*l.*, the judge of a superior court may, on terms, after issue joined, order the cause to be tried by a County Court. (Pollock, 43 ; Broom Com. 60.)

Order of  
superior  
court to try  
cause in  
the County  
Court.

A plaintiff who has obtained an unsatisfied judgment or order in a County Court, for payment of a debt, damages, or costs, may obtain a summons from any Court within the limits of which the other party then dwells or carries on his business, or, by leave of the judge, from the court in which judgment was obtained, requiring him to appear to answer such things as are named in the summons. The amount claimed by the summons may exceed 50*l.*, if the excess consists of costs which have been incurred in the previous proceedings in the action. (Pollock, 131.) And the judge before whom the

Judgment  
summons.

**PART IV.** summons "is heard may rescind or alter any  
**TIT. II.** order previously made against the defendant  
**CAP. IV.** — for payment by instalments, or may make any  
further or other order either for the payment  
of the whole debt or damages, with costs,  
forthwith, or by instalments, or in any other  
manner which seems to him reasonable and  
just. (Pollock, 134.)

And where a judgment or order for a debt  
not exceeding 20*l.*, exclusive of costs, has  
been obtained in any other court of compe-  
tent jurisdiction, such judgment or order  
may be enforced by a County Court in a  
similar manner to that by which a judg-  
ment of a County Court may be enforced by  
means of a judgment summons. (See Pollock,  
210-14.)

Summary  
procedure on  
bills of ex-  
change and  
promissory  
notes.

Within six months after a bill of exchange  
or a promissory note has become due and  
payable, a plaint may be entered, and a sum-  
mons issued against the person whom the  
holder seeks to charge; and the plaintiff  
may at once sign judgment, unless the de-  
fendant obtains leave to appear to the sum-  
mons and defend the action, upon his paying  
into Court the sum indorsed on the summons,  
and upon affidavit showing reasonable and  
plausible grounds, at least, for supposing

that there may be a defence. (See Pollock, 158-9.)

PART IV.  
TIT. II.  
CAP. IV.

When a term has expired, or been duly determined by a notice to quit, and neither the value of the premises nor the rent exceeds 50*l.* a year, and no fine or premium has been paid, the landlord may recover possession by an action in the County Court. A claim for rent or mesne profits, or for both, may also be added, so that the aggregate amount does not exceed 50*l.* (Pollock, 145.)

Recovery of  
small tenements.

The contentious jurisdiction in regard to the grant and revocation of probate and letters of administration is given to the County Court of the district in which the deceased had his fixed place of abode, where it appears by affidavit that his personal estate is under 200*l.*, and that he had no real estate of the value of 300*l.* (Pollock, 223.)\*

Probate and  
administration.

In actions in which the debt or damage is above 20*l.*; in actions of replevin, where the rent or damage exceeds 20*l.*; in actions for the recovery of tenements, where the yearly rent or value exceeds 20*l.*; and in proceedings in interpleader, where the money claimed, or the value of the goods claimed,

\* As to the jurisdiction in certain other cases, see Pollock's County Court, Introd. &c.

PART IV. or of the proceeds thereof, exceeds 20*l.*; and  
TIT. II.  
CAP. IV. in all actions where the parties agree that  
the Court shall have jurisdiction, there is an  
appeal to one of the superior Courts of  
Common Law, if either party be dissatisfied  
with the determination or direction of the  
County Court in point of law, or upon the  
admission or rejection of any evidence, un-  
less, before the decision of the County Court  
is pronounced, both parties agree in writing,  
signed by themselves or their attorneys or  
agents, that the decision of the Judge shall  
be final. But the Judge's finding of facts  
cannot be questioned. (Pollock, 173-4.)

If, on a question of probate and adminis-  
tration, either party is dissatisfied with the  
determination of the Judge, in point of law,  
or upon the admission or rejection of any  
evidence, he may appeal to the Court of  
Probate. (Pollock, 231.)

## CHAPTER V.

OF THE LEADING PRINCIPLES OF EVIDENCE BY  
WHICH THE INTERPOSITION OF THE COURTS  
OF COMMON LAW IN CIVIL CASES IS  
REGULATED.\*

EVIDENCE is either direct or indirect. Direct PART IV.  
TIT. II.  
CAP. V.  
evidence is that which directly proves a fact,  
by witnesses, things, or documents. Indirect Direct and  
indirect  
evidence.  
or circumstantial evidence is that which only  
indirectly proves a fact, by way of inference ;  
and it is either conclusive or presumptive,  
according as the fact to be proved is a ne-  
cessary consequence, or is only a matter  
of probable inference. (Best, 24-5, 388 ;  
Powell, 48.)

Direct evidence is either primary or se- Primary and  
secondary  
evidence.  
condary. Primary evidence would seem to

\* In addition to the philosophic and highly instructive elementary treatise of Mr. Best, the compendious and able treatise of Mr. Powell, and the elaborate practical work of Mr. Roscoe on 'Evidence at Nisi Prius,' on which this concise statement of some of the leading principles of the Law of Evidence is founded, the reader is referred generally to the learned works of Mr. Phillips, Mr. Taylor, Mr. Starkie, and others, on the same subject.

PART IV. be that which constitutes the most original  
 TIT. II. and the highest kind of proof. Secondary  
 CAP. V. evidence would seem to be that which constitutes a derivative or inferior kind of proof.

General rule as to the kind of evidence to be adduced.

It is a general rule that the highest kind, though not the fullest quantity, of evidence must be given of which the nature of the case admits, and which can be obtained; and that secondary evidence is only admissible where primary evidence cannot be obtained. And hence a person may not adduce such evidence as necessarily presupposes the existence of a higher kind of evidence, of which he might have availed himself, but which he has kept back. (Best, 112-4, 579; Roscoe, 1, 4; Powell, 4, 41-2.)

Keeping back a higher evidence.

Admissibility of secondary evidence.

When records and other instruments are facts in issue, no derivative evidence of their contents is receivable until the absence of the original writing is accounted for. (Best, 299, 300; Powell, 41, 356.)

But when primary evidence cannot be had, or at least without such a degree of inconvenience as to amount to that which would be in the highest degree unreasonable, secondary evidence is receivable; as when an original document is destroyed or lost, or is in the possession of the adverse

party, who does not produce it after due notice, or of a party who is privileged to withhold it and insists on his privilege, or of a party who is out of the jurisdiction of the Court; or as in the case of a document of a public nature, of which, to prevent inconvenience, a certified or examined copy is sufficient evidence. (Best, 594, 600; Powell, 318, 337, 356; Roscoe, 415.)

PART IV.  
TIT. II.  
CAP. V.

The law does not recognise any degrees in secondary evidence. A party entitled to resort to secondary evidence may in general resort to any form of it. Thus, the evidence of a witness who has read a destroyed or lost document is receivable, though a copy of it is in existence. But that which is adduced as evidence must really amount to legitimate proof; so that a copy of a copy is not receivable. (Best, 597; Roscoe, 12; Powell, 355.)

Kind of  
secondary  
evidence  
which is  
receivable.

Hearsay evidence—that is, a statement of what the witness has heard another say—is generally inadmissible. But it is admissible when it constitutes part of a transaction, and is explanatory of the nature of such transaction. And (as we shall presently see) there are various cases in which general reputation or the declarations of other persons may be adduced as evidence. (Roscoe, 36, 39, 43; Powell, 84-8, 91, 94.)

Hearsay  
evidence.



**PART IV. Matters of public and general interest —**  
**TIT. II. such as the boundaries of counties or parishes,**  
**CAP. V. rights of common, claims of highway, &c. —**

**Evidence on matters of public and general interest, by declarations of deceased persons, &c.**

may be proved by common reputation, and even by the declarations of deceased persons who may be presumed to have had competent knowledge on the subject, if such declarations were made before any controversy arose. (Best, 613; Powell, 94, 103-4; Roscoe, 39-43.)

**Evidence on pedigree, by such declarations, &c.**

Matters of pedigree may be proved by declarations of deceased persons connected with the family, if made before any controversy arose; by the general reputation of a family, proved by a surviving member of it; by entries in books made by members of the family; by correspondence between them; by recitals and descriptions in deeds and wills, inscriptions, genealogies, &c. (Best, 614; Roscoe, 36-7; Powell, 112-22.)

**Declarations of deceased persons, in other cases.**

Declarations made by deceased persons who had no interest to pervert the facts, and made them against their pecuniary or proprietary interest, are receivable in evidence in proceedings against third parties. (Best, 615; Powell, 129, 131, 133.)

Contemporaneous declarations made in the regular course of business by deceased per-

sons, who had a personal knowledge of the facts and no interest in misrepresenting the truth, are admissible in evidence. (Best, 616; Powell, 138, 144-5; Roscoe, 50.)

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TIT. II.  
CAP. V.  
—

The opinions of witnesses are not in general admissible as evidence. But in matters of science, skill, trade, and peculiar knowledge, experts — that is, persons conversant with the subject — are often required to give their opinions. (Best, 627, 630; Powell, 61-3; Roscoe, 153.)

Opinions of  
witnesses.

Self-serving evidence is not in general admissible; but self-disserving statements, usually termed admissions, are ordinarily receivable in civil cases. (Best, 639, 651, 671.)

Self-serving  
and self-  
disserving  
evidence.

In civil cases, subject to the rules as to the burden of proof, a mere preponderance of probability is a sufficient ground of decision: and slight evidence uncontradicted may become cogent proof. (Best, 120, 337.)

How much  
evidence is  
 requisite.

The testimony of a single witness is sufficient in civil cases. And where an instrument is subscribed by several witnesses, it is generally sufficient to call one, except that, in the case of wills, it is the practice of Courts of Equity to require that all the witnesses who are in England, and capable

Sufficiency of  
one witness.

**PART IV.** of being produced, should be examined.  
**TIT. II.**  
**CAP. V.** (Best, 701, 719; Powell, 46, 361; Roscoe, 116.)

**Duty to give evidence.** No one (except the Sovereign) is exempted by his position, however exalted, from giving evidence. (Best, 168.)

**Evidence against public policy.** Some evidence is excluded on the ground of public policy, as tending to the public detriment. (Best, 732-3; Powell, 80-3.)

**Privileged communications.** Communications made by a person to his counsel, solicitor, or attorney, are privileged from disclosure, unless the client, whose privilege it is, waives it. But no such privilege exists in the case of patients and medical men, or secrets disclosed in the ordinary course of business or friendship. (Best, 734, 740; Powell, 73; Roscoe, 139-42.)

**Evidence tending to expose to a prosecution, penalty, or forfeiture.** Except in certain cases provided for by statute, a witness is not obliged to answer any question, the answering which would have a tendency to expose him to a criminal prosecution or proceedings for a penalty or a forfeiture. (Best, 169-70; Powell, 68, 70.) But a witness cannot refuse to answer a question on the ground that it may tend to show that he owes a debt, or is otherwise subject to a civil suit. (Best, 179; Powell, 70.)

A person is incompetent to give evidence while non compos mentis. (Best, 200-2.) But the testimony of an infant of tender years is receivable, if he understands the nature and obligation of an oath and the consequences of perjury. (Best, 212, 215; Powell, 21-2.)

PART IV,  
TIT. II.  
CAP. V.

Persons in-  
competent  
to give evi-  
dence.

A person is deemed to be incompetent to be a witness, for want of religious belief, if he does not believe in a Supreme Being, who will punish perjury either in this life or in the next. (Best, 221; Powell, 22-6.)

In the case of Quakers, Moravians, and Separatists, the Legislature has substituted for an oath a solemn affirmation or declaration, but has annexed to a false affirmation or declaration the penalties of perjury. And in civil cases, if anyone called as a witness refuses, from alleged conscientious motives, to be sworn, the Court may permit him to make a solemn affirmation or declaration in a given form. (Best, 227-9; Powell, 23.)

Substitution  
for an oath,  
in the case of  
Quakers, &c.

Parties to any civil proceeding, and their wives, may be examined on behalf of either or any of the parties therein. But a husband must not give evidence against his wife, nor

Evidence of  
parties and  
their wives.

PART IV. a wife against her husband, in any criminal  
 TIT. II. proceedings, or in any proceedings instituted  
 CAP. V. in consequence of adultery. And husbands  
 — and wives are not compellable to disclose  
 any communication by the one to the other  
 during the marriage. (Best, 243-4 ; Powell,  
 38, 344.)

Evidence of  
 persons  
 having a  
 pecuniary  
 interest.

Pecuniary interest is not now a ground of incompetency to be a witness. But such an interest, and certain social relations, whether of kindred or otherwise, and the desire of preserving the reputation of the swearer or of others with whom he is identified, are all circumstances which may create a bias, and should be taken into account in estimating the value of testimony. (See Best, 229, 263-5 ; Powell, 27-8.)

Burden of  
 proof.

The burden of proof lies on the party who asserts that which substantially constitutes the affirmation of the issue or question in dispute, though it may not be an affirmative in form, or may involve a negative ; so that the party who denies that affirmative need not give any evidence in support of such denial until the party asserting the affirmative has at least laid some probable grounds for belief of it. But this rule does not apply where the presumption is in favour of the

party asserting the affirmative; nor where the case of the opposite party depends on a fact which is peculiarly within his own knowledge. And proof of a negative may be required, when it is not simple, but qualified by circumstances which are the matter in issue. (Best, 353, 356, 358-61, 363-4, 422; Powell, 181-4; Roscoe, 89, 90.)

PART IV.  
TIT. II.  
CAP. V.  
—

As a general rule, the party alleging a breach of duty must prove it. (Powell, 183.)

If a plaintiff succeed, it must be by the strength of his own right and the clearness of his own proof, and not by the want of right or weakness of proof on the part of his adversary. (Best, 355; Roscoe, 660.)

Plaintiff  
must prevail  
by the  
strength of  
his own case.

It is sufficient if only the substance of the issue is proved. (Best, 371; Powell, 187; Roscoe, 81.)

Substance of  
issues must  
be proved.

Evidence may be rejected as irrelevant, when the connection between the fact to be proved and the evidentiary facts is too remote and conjectural, or when the evidence is not relevant to the pleadings or written statements which the parties have made to enable the tribunal to see the points in dispute. And evidence is unnecessary when the facts have been admitted, or are noticed by the Courts *ex officio*, or deemed notorious,

What evi-  
dence may be  
rejected or is  
unnecessary.

PART IV. or presumed. (Best, 340-2; Powell, 151,  
TIT. II.  
CAP. V. 156, 220, 280; Roscoe, 72, 74.)

Evidence of  
character.

Evidence of character is generally irrelevant and inadmissible in civil cases, unless it is of the substance of the issue. (Powell, 225; Roscoe, 77.)

Evidence in  
a proceeding  
between  
other parties.

The statement of a third party made on oath, even in a judicial proceeding, is not evidence against a person who was no party to such proceeding, nor privy to one who was a party. (Best, 609, 621; Roscoe, 166.)

Different \*  
kinds of pre-  
sumptions.

Some presumptions of law are conclusive, and cannot be rebutted; while others are inconclusive, and may be rebutted. And the latter may be divided into slight and strong, according as they are, or are not of sufficient strength to shift the burden of proof. (Best, 406, 420; Powell, 51.)

Presumption  
of knowledge  
of law, and  
of the con-  
sequences of  
acts.

It is presumed, conclusively, that all persons are acquainted with the law. And every person must be taken to intend the natural consequences of his acts. (Best, 440, 446; Powell, 53; Roscoe, 27.)

Presumption  
of innocence,  
and of that  
which is  
right.

A person is presumed to be innocent of any kind of breach of the law, until proved to be guilty. (Best, 435, 447, 448; Powell, 51; Roscoe, 26.)

No person is to be required to explain or

contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction. (Best, 448; Powell, 49.)

PART IV.  
TIT. II.  
CAP. V.  
—

Where an instrument or act is susceptible of two constructions, the one involving that which is legal, and the other that which is illegal, the parties will be presumed to have intended the former. (Best, 449.)

All persons are presumed to have acted rightly; so that non-performance of duty, misconduct, irregularity, fraud, perjury, or vice, is not to be presumed. (Best, 450-4, 460; Roscoe, 35.) Hence, the Courts are inclined to dispense with proof of circumstances which are essential to the validity of official and other acts, and by which they were probably accompanied in most instances. Thus, prior acts are sometimes inferred from posterior acts, and posterior acts from prior acts, and intermediate acts from antecedent and subsequent acts. (Best, 456.)

Possession, or quasi possession, as the case may be, is *primâ facie* evidence of property. (Best, 465; Roscoe, 660.)

The posting of a letter is *primâ facie* proof of its receipt in due time. (Best, 503.)

Presumption  
of receipt of  
a letter.



**PART IV.** The presumption, in the absence of evidence to the contrary, is in favour of the continuance of things in the same state in which they are proved to have existed. (Best, 504; Roscoe, 27.)

**TIT. II.  
CAP. V.**

**Presumption  
of continu-  
ance of the  
same state of  
things.**

**Presumption  
of continu-  
ance of  
human life.** There is no presumption of law relative to the extreme duration of human life. But when a person goes abroad, or leaves his usual place of resort, and has not been heard of for seven years, the presumption of the continuance of life ceases. (Best, 508; Roscoe, 34.)

**Presumption  
as to stamp.** In the absence of evidence to the contrary, a document which is lost or not produced on notice, will be presumed to have been duly stamped. (Best, 310; Powell, 356; Roscoe, 36.)

**Proof of  
deed.** The execution of a deed must be proved by at least one, and, in some cases, by all the attesting witnesses, notwithstanding the testimony of third persons, or an admission of the party by whom it was executed, except it be a formal admission made inter partes for the purpose of the trial. If the witnesses are dead, or insane, or out of the jurisdiction of the Court, or cannot be found, proof may be given of their handwriting. No proof, however, is required of a deed more than thirty years old and coming from the proper

custody. (Best, 294-5; Powell, 359-60; PART IV. TIT. II. CAP. V. Roscoe, 114, 120.) And documents attested, but not requiring attestation, may be proved as if not attested. (Best, 295-6; Powell, 359-60.) Proof of documents which require no attestation.

Judgment as to the genuineness of handwriting may be formed from having seen the person write on former occasions; or from having corresponded with him, or had other opportunities of seeing his handwriting; or from a comparison of the handwriting in question with other documents proved or admitted to have been written by him. (Best, 316; Powell, 356; Roscoe, 119-20.) Proof of handwriting.

Where part of a document or statement is used against a person, he has a right to have the whole of it laid before the jury, so far as it bears upon the part so used. (See Best, 640; Powell, 277.) Right to have context read.

That part of a record which states what has taken place cannot be disputed; but the judicial part is in general only evidence against those who are parties or privy to the proceeding. (Best, 742-3; Roscoe, 157-8.) Evidence of a record.

Either party in a civil proceeding in any of the superior Courts is entitled to an inspection of documents in the possession of the opposite party, and to take copies of them. (Best, 752-3; Powell, 331-2.) Right to inspect and copy documents.

**PART IV.** When documents required as evidence are  
**TIT. II.** in the possession of the adverse party, a  
**CAP. V.** notice to produce them should be served on  
 him; and, if he does not produce them,  
 secondary evidence of their contents may be  
 given. If they are in the possession of a  
 third person, he may be served with a sub-  
 poena duces tecum, i.e. a summons to attend  
 the trial as a witness, and bring the docu-  
 ments with him. But a person need not  
 produce documents, if the disclosure would  
 involve a breach of professional confidence,  
 or might subject him to a criminal prose-  
 cution, penalty, or forfeiture, or loss of his  
 estate or interest. So that he or his attor-  
 ney need not produce the muniments of title  
 to his estate, but secondary evidence of their  
 contents may be given. (Best, 289-90;  
 Powell, 337-8; Roscoe, 7, 133.)

Notice to  
 admit docu-  
 ments.

Either party may call on the other party,  
 by notice, to admit any document, saving all  
 just exceptions; and in case of refusal or  
 neglect to admit it, the costs of proving the  
 document must be paid by the party so  
 neglecting or refusing, whatever the result  
 of the cause may be, unless the Judge certi-  
 fies that the refusal to admit was reasonable.  
 (Best, 759; Powell, 168-9.)

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*One of the Consolidators of the Chancery Orders.*

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